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January 25, 2005

5 TN REGULATORY AUTHORITY
DOCKET ROOM

Honorable Pat Miller, Chairman
Tennessee Regulatory Authority
ATTN: Sharla Dillon, Dockets
460 James Robertson Parkway
Nashville, TN 37243-5015

Via Hand Delivery


RE: Joint Petition for Arbitration of an Interconnection Agreement with BellSouth
Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act
of 1934, as Amended, Tennessee Regulatory Authority Docket No. 04-00046

Dear Ms. Dillon

The enclosed depositions are part of supplemental discovery in the above-referenced
docket. A copy of the depositions has been supplied to opposing counsel.

Thank you for your assistance in this matter.

Sincerely,



H. LaDon Baltimore

LDB/dcg
Enclosure

1 BEFORE THE
2 NORTH CAROLINA UTILITIES COMMISSION

3 Docket No. P-772, Sub 8
4 Docket No. P-913, Sub 5
5 Docket No. P-989, Sub 3
6 Docket No. P-824, Sub 6
7 Docket No. P-1202, Sub 4

COPY

8 In the Matter of)
9)
10 Joint Petition NewSouth)
11 Communications Corp., et al. for)
12 Arbitration with BellSouth)
13 Telecommunications, Inc.)

14 Raleigh, North Carolina
15 Friday, December 17, 2004
16 Deposition of MARVA JOHNSON,
17 VOLUME I

18 a witness herein, called for
19 examination by counsel for BellSouth, in
20 the above-entitled action, pursuant to
21 Notice, the witness being duly sworn by
22 Nicole Ball Fleming, Court Reporter and
23 Notary Public in and for the State of
24 North Carolina, taken at the offices of
25 Parker Poe Adams & Bernstein, 150
 Fayetteville Street Mall, Suite 1400,
 Raleigh, North Carolina, beginning at 2:22
 p.m., on Friday, December 17, 2004, such
 proceedings being taken stenographically
 by Nicole Ball Fleming.

<div>Page 2</div> <div>1 APPEARANCES OF COUNSEL</div> <div>2</div> <div>3 On behalf of the Joint Petitioners</div> <div>4</div> <div>5 Henry C. Campen, Jr</div> <div>6 Parker, Poe Adams & Bernstein</div> <div>7 150 Fayetteville Street Mall</div> <div>8 Suite 1400</div> <div>9 Raleigh, NC 27601</div> <div>10</div> <div>11 Garret R. Hargrave</div> <div>12 Kelley Drye & Warren</div> <div>13 1200 19th Street, NW</div> <div>14 Suite 500</div> <div>15 Washington, DC 20036</div> <div>16</div> <div>17 On behalf of BellSouth</div> <div>18</div> <div>19 Jim Meza</div> <div>20 Robert Culpepper</div> <div>21 BellSouth Legal Department</div> <div>22 675 West Peachtree Street, NE</div> <div>23 Suite 4300</div> <div>24 Atlanta, GA 30375</div> <div>25</div>	<div>Page 4</div> <div>1 STIPULATIONS</div> <div>2 Prior to examination of the witness,</div> <div>3 counsel for the parties stipulated and</div> <div>4 agreed as follows:</div> <div>5 1. Said deposition shall be taken for</div> <div>6 the purpose of discovery or for use as</div> <div>7 evidence in the above-entitled action or</div> <div>8 for both purposes, as permitted by the</div> <div>9 applicable rules of civil procedure.</div> <div>10 2. Any objections of any party hereto as</div> <div>11 to Notice of the taking of said deposition</div> <div>12 or as to the time and place thereof or as</div> <div>13 to the competency of the person before</div> <div>14 whom the same shall be taken are hereby</div> <div>15 waived.</div> <div>16 3. Objection to questions and motions to</div> <div>17 strike answers need not be made during the</div> <div>18 taking of this deposition, but may be made</div> <div>19 for the first time during the progress of</div> <div>20 the trial of this case, or at any pretrial</div> <div>21 hearing held before the Judge for the</div> <div>22 purpose of ruling thereon or at any other</div> <div>23 hearing of said case at which said</div> <div>24 deposition might be used, except that an</div> <div>25 objection as to the form of a question</div> <div>must be made at the time such question is</div> <div>asked or objection is waived as to the</div> <div>form of the question.</div> <div>4 That all formalities and requirements</div> <div>of the Statute with respect to any</div> <div>formalities not herein expressly waived</div> <div>are hereby waived, especially including</div> <div>the right to move for the rejection of</div> <div>this deposition before trial for any</div> <div>irregularities in the taking of the same,</div> <div>either in whole or in part or for any</div> <div>other cause;</div> <div>5. That the sealed original transcript</div> <div>of this deposition shall be mailed</div> <div>first-class postage or hand-delivered to</div> <div>the party taking the deposition or its</div> <div>attorney for preservation and delivery to</div> <div>the Court, if and when necessary</div>
<div>Page 3</div> <div>1 INDEX TO EXAMINATIONS & EXHIBITS</div> <div>2 Examination Page</div> <div>3 Direct by Mr. Meza 5</div> <div>4</div> <div>5 - - -</div> <div>6 Deposition Exhibit Page</div> <div>7 21 33</div> <div>8 22 36</div> <div>9 23 38</div> <div>10 24 40</div> <div>11 25 59</div> <div>12</div> <div>13</div> <div>14</div> <div>15</div> <div>16</div> <div>17</div> <div>18</div> <div>19</div> <div>20</div> <div>21</div> <div>22</div> <div>23</div> <div>24</div> <div>25</div>	<div>Page 5</div> <div>1 MARVA JOHNSON,</div> <div>2 having been duly sworn,</div> <div>3 testified as follows:</div> <div>4 DIRECT EXAMINATION</div> <div>5 BY MR. MEZA:</div> <div>6 Q. Good afternoon, Ms. Johnson.</div> <div>7 A. Good afternoon.</div> <div>8 Q. My name is Jim Meza. I'm a lawyer for</div> <div>9 BellSouth, and I'm representing them in</div> <div>10 the arbitration proceeding between KMC,</div> <div>11 NuVox, Xspedius, and BellSouth. And I'm</div> <div>12 here to take your deposition.</div> <div>13 Have you ever been deposed before?</div> <div>14 A. I have.</div> <div>15 Q. When?</div> <div>16 A. Do you want dates or --</div> <div>17 Q. Dates would be great to start off with.</div> <div>18 A. I don't recall exactly, but I was deposed</div> <div>19 by BellSouth and by the Commission and</div> <div>20 Verizon in Florida for the Triennial</div> <div>21 Review state proceedings last year</div> <div>22 sometime. I was deposed by Verizon in a</div> <div>23 AAA arbitration some three years ago.</div> <div>24 Q. Have you been deposed in any other</div> <div>25 commission proceeding other than the</div>

<p style="text-align: right;">Page 6</p> <p>1 Florida proceeding you just referenced? 2 A. Not that I can recall. 3 Q. What's your current position at KMC? 4 A. My current position is vice president and 5 senior counsel for regulatory affairs. 6 Q. Are you a lawyer by trade? 7 A. I am. 8 Q. Are you appearing here today as a lawyer? 9 A. I am actually appearing here today to 10 provide testimony on the issues set forth 11 in the scope of my testimony. 12 Q. And are you doing that as a lawyer or as a 13 witness? 14 A. I'm doing it in my capacity as the 15 regulatory affairs vice president for 16 KMC. All of those issues are not legal 17 issues. 18 Q. Are you providing any testimony on legal 19 issues? 20 A. Are you asking whether or not I'm 21 providing a legal opinion -- 22 Q. Yes. 23 A. -- on each of these issues -- 24 Q. Yes. 25 A. -- or whether I'm --</p>	<p style="text-align: right;">Page 8</p> <p>1 Q. Who are they? 2 A. James Monds, Michael Duke, Chad Pifer, and 3 Virginia Tate. 4 MR. MEZA: For the record, 5 Mr. Pifer is present in the deposition by 6 agreement. He has agreed not to 7 participate in any way; is that correct, 8 Mr. Campen? 9 MR. CAMPEN: That's correct. 10 MR. MEZA: Off the record. 11 (DISCUSSION OFF THE RECORD.) 12 Q. What are your job duties in your current 13 position? 14 A. My job duties include overall 15 responsibility for managing KMC's 16 compliance with state and regulatory 17 requirements -- state and federal 18 regulatory requirements as well as 19 managing KMC's tariffs, KMC's compliance 20 filings, responding to customer 21 complaints, negotiating and implementing 22 or managing implementation of 23 interconnection agreements, managing 24 KMC's -- from an internal perspective -- 25 dockets and other legal proceedings that</p>
<p style="text-align: right;">Page 7</p> <p>1 Q. That's what I'm asking you. 2 A. Yes. 3 Q. You are? 4 A. (Witness nods head up and down.) 5 Q. So you are acting as a lawyer and a 6 witness in this proceeding? 7 A. No. I do not represent -- We have 8 engaged counsel to litigate this 9 proceeding. I am, by title and by 10 responsibility, KMC's internal counsel and 11 also the business owner for regulatory 12 matters. 13 Q. In providing your testimony, are you 14 suggesting that the Commission should 15 agree with you because you are a lawyer or 16 because you are presenting KMC's policies 17 relating to -- 18 A. Because I am presenting KMC's policies. 19 Q. Okay. Who do you report to? 20 A. I report to Rosco C. Young, the second CEO 21 for KMC. 22 Q. Do you have anybody reporting to you? 23 A. I do. 24 Q. Who is that? 25 A. I have four direct reports.</p>	<p style="text-align: right;">Page 9</p> <p>1 KMC participates in. 2 Q. Does KMC operate outside of BellSouth's 3 region? 4 A. KMC does operate outside of BellSouth's 5 region. 6 Q. Do you have those duties that you just 7 mentioned for all areas in which KMC 8 operates, including those outside of 9 BellSouth's region? 10 A. I do. 11 Q. Is there anyone in particular at KMC whose 12 sole responsibility is to deal with issues 13 arising in BellSouth's region? 14 A. When you say "issues", what type of 15 issues? 16 Q. Matters that would come before you or 17 someone in your group in the regulatory 18 department. 19 A. No. 20 Q. Do you consider yourself to be the most 21 knowledgeable person at KMC regarding the 22 issues that you have been designated to 23 testify about -- 24 A. I do. 25 Q. -- in this proceeding?</p>

3 (Pages 6 to 9)

<p style="text-align: right;">Page 10</p> <p>1 A. I do. 2 Q. And you understand that you have been 3 provided to -- or that you have been 4 selected as the 30(b)(6) deponent for KMC? 5 A. It is not my understanding that I'm the 6 30(b)(6). My understanding, that we were 7 not noticed to provide 30(b)(6) witnesses. 8 Q. Have you seen the notice? 9 A. I have. 10 Q. And it's your opinion that those were not 11 30(b)(6) notices? 12 A. It's my opinion that I don't recall it 13 being a 30(b)(6) notice. 14 Q. Okay. 15 In any event, you believe you have 16 the most knowledge, irrespective of 17 whether a 30(b)(6) notice was issued or 18 not? 19 A. To represent the issues that I am here to 20 represent. 21 Q. There are multiple KMC entities in this 22 proceeding; is that accurate? 23 A. That is accurate. 24 Q. Do you speak on behalf of and bind each 25 one of those companies?</p>	<p style="text-align: right;">Page 12</p> <p>1 each of the jurisdictions that it does 2 business. 3 Q. What does KMC Data do? 4 A. KMC Data does not yet provide service. We 5 have several business plans that we've 6 considered operating under KMC Data. 7 Q. What about KMC Telecom V, Inc.? 8 A. KMC Telecom V, Inc., is primarily our 9 wholesale subsidiary. 10 Q. And KMC Telecom, III, LLC? 11 A. KMC Telecom, III, LLC, is primarily a 12 retail facility. 13 Q. How long have you been with KMC? 14 A. Since September of 2000. 15 Q. Have you been in the same position since 16 your employ with KMC? 17 A. No. 18 Q. What other positions have you held? 19 A. When I came to KMC, I was hired as the 20 director for ILEC compliance. 21 Q. What is -- What did that entail? 22 A. That position entailed primarily 23 negotiation and enforcement of 24 interconnection agreements. 25 Q. How long were you in that position?</p>
<p style="text-align: right;">Page 11</p> <p>1 A. I can. 2 Q. Excuse me? 3 A. I do. 4 Q. You do. 5 Who do you work for, which entity? 6 A. I'm employed by KMC Telecom Holdings, 7 Inc. It's a holding -- Each of the 8 entities represented as certificate of 9 carries in this proceeding on behalf of 10 KMC are wholly owned subsidiaries of KMC 11 Telecom Holdings, Inc. 12 Q. So you're not employed by KMC Telecom V or 13 KMC Telecom, III, LLC? 14 A. I'm an officer in each of those 15 companies. They're wholly owned 16 subsidiaries of KMC Telecom Holdings, Inc. 17 Q. Why are there two entities in this 18 arbitration with KMC? 19 A. There should actually be three. 20 Q. What's the third one? 21 A. KMC Data. 22 Q. Why are there three? 23 A. It's the way that KMC's structured. Each 24 of those entities is an independent entity 25 with its own operating authority within</p>	<p style="text-align: right;">Page 13</p> <p>1 A. I was in that position until July of 2002. 2 Q. And what position did you move to? 3 A. Director of legal and regulatory affairs. 4 Q. What job duties did you have in this 5 position? 6 A. In addition to having responsibility for 7 interconnection agreements, I also had 8 responsibilities for managing KMC -- 9 legal matters associated with KMC's 10 compliance enforcement of the Act. 11 Q. Okay. How long were you in this position? 12 A. Until October of 2003. 13 Q. And at that time did you have a new 14 position? 15 A. Yes. I became vice president and senior 16 counsel. 17 Q. Is that your current position today? 18 A. That is my current position today. 19 Q. At all times at KMC, were you responsible 20 for legal matters at KMC? 21 A. Not at all times. 22 Q. Which times were you not? 23 A. In the first position as director of ILEC 24 compliance. 25 Q. What states will you be testifying in?</p>

4 (Pages 10 to 13)

<p style="text-align: right;">Page 14</p> <p>1 A. Quite -- I know I will testify in North 2 Carolina. I cannot recall which other 3 states. It's likely that I will also 4 testify in Florida and Tennessee. 5 Q. Are you sure that you will not be 6 testifying in the other six states? 7 A. I am not. 8 Q. Do you have any understanding whether it's 9 likely you will be testifying in the other 10 six states? 11 A. It's a possibility. 12 Q. If you don't testify, who will be 13 testifying on behalf of KMC? 14 A. Chad Pifer. 15 Q. Does Mr. Pifer also have the ability to 16 bind KMC? 17 A. It depends on the scope of the issue. 18 Q. For those issues that he will be replacing 19 you as the witness for, will he have the 20 ability to bind KMC? 21 A. By designation. 22 Q. What does that mean? 23 A. By designation of my authority. He's not 24 an officer of any of those companies. 25 Q. So you will designate him as a person that</p>	<p style="text-align: right;">Page 16</p> <p>1 decision hasn't been unanimous. 2 Q. Would it be fair to say that the companies 3 that are in this arbitration have 4 different business plans to some degree? 5 A. To some degree, that would be fair. 6 Q. Would it also be fair to say that there 7 are some CLECs in this proceeding that 8 feel more strongly about certain issues 9 than other issues? 10 A. There are certainly some issues that 11 impact different business plans in 12 different ways. 13 Q. Do you have an understanding of what 14 issues that are remaining impact KMC 15 differently than the other CLECs? 16 A. Of the issues that are remaining? 17 Q. Yes. 18 A. They all impact KMC significantly enough 19 or significantly to continue to move 20 forward with the arbitration. 21 Q. Are there any issues that are remaining 22 that you believe would not be an issue had 23 BellSouth and KMC negotiated between 24 themselves? 25 A. Not that I can recall.</p>
<p style="text-align: right;">Page 15</p> <p>1 can bind? 2 A. Correct. 3 Q. Okay. 4 A. For the purpose of these proceedings. 5 Q. Are -- All the CLECs that are in this 6 arbitration, are they unified on all of 7 the positions that remain? 8 A. We are. 9 Q. Do you know if there's ever been a 10 disagreement as to a position the CLECs 11 should take regarding an issue? 12 A. I cannot recall a disagreement on how the 13 rules apply. To the extent there has been 14 any disagreement, it's been generally on 15 how to compromise in order to move the 16 negotiations forward with BellSouth. And 17 even then, we were able to come to 18 unanimous conclusions. 19 Q. Is it your testimony today that whenever 20 there has been a decision that has been 21 made, that the CLECs have been unanimous 22 in that decision? 23 MR. CAMPEN: Objection to the form 24 of the question. You may answer. 25 A. I cannot recall an instance where a</p>	<p style="text-align: right;">Page 17</p> <p>1 Q. Now, you've stated that KMC has operations 2 outside of BellSouth's region; is that 3 correct? 4 A. That is correct. 5 Q. What other regions or territories or RBOC 6 areas does KMC operate? 7 A. KMC operates in substantially all of 8 Verizon's region, substantially all of 9 SBC's region, and Qwest's region, and in 10 about seventeen states where Sprint is the 11 incumbent. KMC also operates in 12 CenturyTel, Alltel, Valor, Mid-Plains. 13 We're certificated in 50 states. 14 Q. Currently, is KMC in arbitration with any 15 other RBOC or ILEC? 16 A. Yes. 17 Q. Which ones? 18 A. With Sprint and SBC. 19 Q. Where are you in arbitration with Sprint? 20 A. Texas, Kansas, Oklahoma -- oh, I'm sorry, 21 that's SPC. My apologies. 22 Q. No problem. 23 A. With Sprint, we have four states where we 24 have pending arbitrations on file: 25 Tennessee, Virginia, Florida, and North</p>

5 (Pages 14 to 17)

Page 18

1 Carolina -- actually, there are five, I'm
2 sorry -- Minnesota.
3 Q. And for each of those Sprint states, the
4 arbitration process -- well, the hearing
5 has concluded; is that right?
6 A. No. We have arbitrations on file.
7 They're in abeyance.
8 Q. Why are they in abeyance?
9 A. They're in abeyance pending additional
10 time for the parties to negotiate and
11 resolve issues.
12 Q. Have these arbitrations been filed yet?
13 A. Each of the five that I noted for you have
14 been filed. There are ones that are
15 pending filing. We are in negotiation and
16 the window has not expired.
17 Q. Oh, for each of the five in the Sprint
18 territory, you're still in your window --
19 or you're trying to extend the window?
20 A. No. For each of the five in the Sprint
21 territory --
22 Q. Yes.
23 A. -- There are arbitrations that have been
24 filed.
25 Q. Okay.

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1 A. There are some that are pending, but the
2 window has not been reached. So there are
3 negotiations ongoing, but no arbitration
4 has been filed.
5 Q. And when you're saying that the
6 arbitration is pending, you're not
7 referring to the five states that you just
8 identified?
9 A. No, and it will be more accurate to say
10 the negotiations are ongoing and no
11 arbitration has been filed in additional
12 states.
13 Q. Got it. What about the SPC states?
14 A. Texas, Kansas, and Oklahoma.
15 Q. Are those arbitration proceedings?
16 A. They are joint arbitration proceedings to
17 which KMC is a party.
18 Q. What is the status of each of those
19 arbitration proceedings?
20 A. Texas, the hearing's complete. We're
21 awaiting a decision.
22 Q. Okay. Kansas?
23 A. Kansas, it's an interesting arbitration.
24 It was a forced arbitration, whereby SPC
25 automatically joined parties. We are

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1 negotiating a memorandum of understanding
2 as to how to proceed.
3 Q. Have you filed issues in Kansas?
4 A. No, not on behalf of KMC. And the same
5 status applies to Oklahoma.
6 Q. For the SPC Texas hearing, are you aware
7 if there are any similar or identical
8 issues relating to general terms and
9 conditions in that arbitration proceeding
10 that are identical or similar to the
11 issues in the GTCs in this proceeding?
12 A. Yes.
13 Q. Which items or issues?
14 A. Unfortunately, I didn't come prepared
15 today to actually be able to identify
16 those, but I -- I cannot provide you an
17 exhaustive list.
18 Q. That's okay. I'd just like --
19 A. But, for example, one of the issues
20 includes the migration cost.
21 Q. Do you remember anything else?
22 A. Security deposits.
23 Q. And I'm going to ask you the same question
24 for the Sprint arbitrations that have been
25 filed and are currently in abeyance.

Page 21

1 A. If the negotiations included similar
2 issues or if the arbitration?
3 Q. Arbitration.
4 A. The arbitration did, but those issues have
5 been resolved. They are no longer open
6 issues in those proceedings.
7 Q. Are you arbitrating with any other CLEC in
8 the Sprint arbitrations?
9 A. No.
10 Q. And in the Texas arbitration, are you
11 arbitrating jointly?
12 A. Oh, my gosh, every CLEC in Texas.
13 Q. Would that include NuVox or Xspedius and
14 NewSouth?
15 A. Xspedius is definitely included. NuVox
16 does not have service in Texas.
17 Q. What about Kansas and Oklahoma?
18 A. I believe that Xspedius is included in
19 Kansas. It's not in Oklahoma, but I
20 cannot recall exactly.
21 Q. Okay. Do you know how many customers KMC
22 has in BellSouth's region?
23 A. I don't recall offhand.
24 Q. Do you have any understanding of the
25 magnitude of -- or number of customers?

6 (Pages 18 to 21)

Page 22

1 A. Not by BellSouth's region specifically,
2 unfortunately.
3 Q. Do you have an understanding of the total
4 number of customers that KMC has?
5 A. Approximately 14,000.
6 Q. Do you know what KMC's monthly billings to
7 BellSouth are?
8 A. Approximately 300,000, maybe.
9 Q. And do you know what the --
10 A. It's about \$4 million a year.
11 Q. And I apologize for interrupting you. I
12 will try not to.
13 Do you know what those billings
14 represent?
15 A. Those are carrier access billing charges.
16 Q. Would that be reciprocal compensation?
17 A. CABS, all CAB facilities, including
18 intrastate switched access would apply.
19 Q. Do you know what BellSouth's monthly
20 billings to KMC roughly amount to a month?
21 A. I do not know in total. I could tell you
22 specific to UNE services.
23 Q. Sure.
24 A. Specific to UNE services, it's about
25 \$550,000 a month.

Page 23

1 Q. Do you know how many access lines KMC has
2 in BellSouth's region?
3 A. I do not know by BellSouth's region.
4 Q. What about nationwide?
5 A. Unfortunately, I cannot provide a number.
6 I'm not certain as to that figure.
7 Q. Do you have an understanding of what that
8 figure may be?
9 A. I do not.
10 Q. Can you describe to me KMC's -- and when
11 I use the term KMC, I'm talking about all
12 your companies, make sure that we're clear
13 on that -- KMC's operations and the
14 services that it provides to customers?
15 A. Could you please repeat your question?
16 Q. Sure. Can you please describe to me KMC's
17 operations and the different services that
18 it provides to its customers?
19 A. Oh, great. KMC is a Tier II, Tier III
20 market provider. KMC provides services
21 primarily to business customers, primarily
22 at the DS-1 level. KMC also provides
23 wholesale services to other carriers.
24 Those wholesale services include
25 end-to-end services in a complete turnkey

Page 24

1 provisioning service. They also include
2 transport between KMC's switch and an
3 IXC's switch or point of presence. And
4 they may also include the resale of fiber
5 that we have in our network.
6 Q. Anything else?
7 A. Of course, those services vary. We
8 provide data and basic telecommunications
9 services within that gamut of our service
10 offerings. That's basically KMC's
11 business.
12 Q. What's that Tier II and Tier III market?
13 A. Those are -- Those are the sizings for
14 those markets. I believe it's about
15 250 -- a population of 750 on down.
16 Q. So smaller areas? I mean, is --
17 A. Smaller areas.
18 Q. Tier I is big city?
19 A. Yes. Tier 1 is big cities.
20 Q. Okay.
21 A. Tier II, Tier III are less dense
22 populations.
23 Q. What is Raleigh, just to give me a
24 perspective?
25 A. I can't recall specifically what Raleigh

Page 25

1 is. And Raleigh is growing, so it may
2 have been at one point Tier II and it may
3 still be Tier II but approaching Tier I.
4 Q. You've mentioned wholesale services and
5 end-to-end something with turnkey
6 something. What is that?
7 A. For example, if the city of New Smyrna
8 wanted to build out a subdivision, they
9 might actually build fiber in. We might
10 provide switching, but we would provision
11 the service end to end on their behalf.
12 We would order numbers. We would connect
13 our network to their fiber at the end-user
14 premises. We'd provide them transport to
15 get to our switch.
16 Q. So when you say end to end, you're
17 effectively performing all the
18 telecommunication services that would be
19 required?
20 A. For them to provision service to an end
21 user.
22 Q. Yes. And in that instance, they would
23 totally bypass the BellSouth network?
24 A. In that example.
25 Q. What's the significance of the phrase

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1 turnkey? What is that?
2 A. Have to ask my marketing people.
3 Q. Okay. You've also said that you provide,
4 on a wholesale basis, transport. Can you
5 please describe that further?
6 A. It's transport from KMC's switch to an
7 IXC's point of presence typically.
8 Q. And is that something you provide to other
9 carriers?
10 A. Generally to IXCs. It's very limited
11 because, again, it is coming from KMC's
12 network to the IXC's presence. There's a
13 limited market for that transport.
14 Q. And the resale of fiber, can you please
15 describe that in further detail?
16 A. For example, if I had excess fiber in the
17 City of Huntsville and there was a
18 wireless provider that needed fiber and I
19 had dark fiber that was available, I
20 might -- we might sell that dark fiber
21 under an IRU to another carrier.
22 Q. Do you resell switching services?
23 A. We do not. However -- We do not
24 currently. However, if you look at our
25 product catalog, you'd see that we'd like

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1 an opportunity to do that.
2 Q. And do you provide transit functions on a
3 wholesale basis?
4 A. We do.
5 Q. Other than what you've described to me
6 between the IXC and KMC?
7 A. We don't currently provide that service.
8 Q. When you answered we do, what were you
9 thinking of when I asked you if you
10 provided transit service?
11 A. I was thinking of the IXC example.
12 Q. Do you have any residential customers?
13 A. We do not.
14 Q. Do you have any customers that are served
15 via UNE-P?
16 A. Very limited.
17 Q. When you say "very limited", can you
18 provide a number or percentage?
19 A. Maybe 1 percent.
20 Q. Do you know if any of KMC's customers have
21 BellSouth's FastAccess service today?
22 A. I do not.
23 Q. Do you know what I'm referring to when I
24 say BellSouth's FastAccess service?
25 A. It's my presumption that you were

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1 referring to BellSouth's DSL service.
2 Q. Its retail DSL service.
3 A. Right.
4 Q. Is it your understanding that BellSouth
5 also offers a wholesale DSL product?
6 A. Correct, it is.
7 Q. Do you know if KMC is providing DSL
8 service to any of its customers by
9 purchasing BellSouth's wholesale DSL
10 product?
11 A. Not that I am aware of.
12 Q. Do you have tariffs on file in each of the
13 states which you operate?
14 A. Each state that requires tariffs.
15 Q. Are there some that don't?
16 A. North Carolina is detariffed.
17 Q. Does KMC still provide its customers with
18 access to a North Carolina tariff?
19 A. We do not have a North Carolina tariff.
20 We have a statement of terms and
21 conditions on our website.
22 Q. You don't consider that a tariff?
23 A. Technically, because the state is
24 detariffed, I traditionally believe that
25 tariffs are on file with the Commission

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1 and approved by the Commission.
2 Q. So how do you -- Well, is it your intent
3 to bind customers in North Carolina to
4 those terms and conditions that you
5 referenced on your website?
6 A. It is my -- KMC's intent to represent to
7 customers that those are the terms and
8 conditions under which KMC will provide
9 services for customers in the state of
10 North Carolina.
11 Q. And how do you incorporate those terms and
12 conditions for customers in North
13 Carolina?
14 A. Some customers may have contracts or some
15 may take those terms and conditions based
16 on the web representation.
17 Q. So you incorporate the web pages through
18 the contract, is that how you do it?
19 A. If a customer has a contract. If a
20 customer does not, then the web pages
21 speak for themselves.
22 Q. Are you aware of any instance where the
23 terms of a KMC contract deviate from KMC's
24 tariffs regarding standard limitation of
25 liability language?

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1 A. I am. ←
2 Q. What instance are you referring to?
3 A. I cannot recall a specific instance, but I
4 know that I have seen contracts that do ←
5 not have the exact language set forth in
6 the tariff.
7 Q. Do you know how often that occurs?
8 A. I couldn't give a specific frequency
9 because I don't see all contracts.
10 Q. Do you think it happens frequently?
11 A. I couldn't give a frequency.
12 Q. Do you know what percentage of KMC's
13 customers purchase services out of a
14 tariff versus a contract?
15 A. I do not.
16 Q. Who would know at KMC?
17 A. I doubt that anyone would know offhand
18 if --
19 Q. What percentage of your customers -- your
20 14,000 customers are served via contract?
21 A. I doubt that anyone has that number
22 calculated offhand.
23 Q. What does KMC prefer?
24 A. I don't know that we've stated a
25 preference.

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1 Q. So it's perfectly acceptable for a
2 customer to purchase services out of a
3 tariff, in your mind?
4 A. It is perfectly acceptable.
5 Q. And you intend for those tariff provisions
6 to be binding upon a customer?
7 A. Indeed, if the customer so chooses to
8 purchase from the tariff.
9 Q. And to the extent a contract incorporates
10 the terms of the tariff, you believe the
11 customer should be bound by those terms as
12 well?
13 A. Indeed, if the contract incorporates the
14 tariff by reference.
15 Q. Do you consider NuVox a competitor?
16 A. I do.
17 Q. Are you aware of any instance where NuVox
18 has taken a customer from KMC?
19 A. It's almost like an urban legend, because
20 I am not in sales. I would not actually
21 see instances, but I hear reports
22 frequently of NuVox winning customers over
23 KMC.
24 Q. Winning over that -- Are you referring to
25 a customer who is choosing between KMC and

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1 NuVox or a customer leaving KMC and going
2 to NuVox?
3 A. A customer who is choosing between KMC or
4 NuVox.
5 Q. Are you aware of any instance where NuVox
6 has enticed a customer to switch service
7 from KMC to NuVox?
8 A. Not directly.
9 Q. What about Xspedius?
10 A. The same references as with NuVox. I am
11 not directly aware of an instance where we
12 have lost a customer to Xspedius.
13 Q. Are you aware of customers choosing
14 Xspedius over KMC?
15 A. I have heard salespeople present their
16 representation that we have lost a
17 customer in a bid against Xspedius.
18 Q. Have you considered the small/medium
19 business market to be competitive among
20 CLECs?
21 A. It varies by market. There are some
22 markets that are more competitive.
23 Q. Are you seeing competition today between
24 CLECs versus competition with just
25 BellSouth?

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1 A. Today, I would still say that 90 percent
2 of our competition, it appears, comes from
3 the incumbent, though I am not in sales,
4 so I cannot represent that, never direct
5 knowledge.
6 Q. Does BellSouth pay KMC SEEMs penalties?
7 A. BellSouth does.
8 Q. Do you know what, on a monthly basis,
9 those penalties amount to?
10 A. Those penalties vary. They have been as
11 high as \$60,000 a month and as low as 5.
12 They range -- The average appears to be
13 around \$43,000 a month.
14 Q. And that's region-wide?
15 A. That's region-wide.
16 (DISCUSSION OFF THE RECORD.)
17 (DEPOSITION EXHIBIT NO. 21 WAS MARKED.)
18 Q. I'm showing you what's marked as Exhibit
19 21. And I represent to you that I got
20 that off of the KMC web page. And I've
21 highlighted a portion of it that refers to
22 last mile service. Do you see that?
23 A. Correct.
24 Q. What is that?
25 A. If you'll give me just one moment to read

<p>Page 34</p> <p>1 it. 2 Q. Sure. 3 (PAUSE.) 4 Q. Finished? 5 A. Let me read it one more time. 6 Q. Okay.. 7 (PAUSE.) 8 A. Okay. 9 Q. Do you know what that is? 10 A. What it appears to be -- and I don't 11 know, again, this was likely written by 12 the marketing or the PR department -- is 13 KMC's representation that it can provide 14 to customers who are picked to this IXC 15 last mile access to end users is -- 16 Q. And what does that mean? 17 A. My interpretation of it is that in 18 instances where KMC owns the retail end 19 user -- 20 Q. Yeah. 21 A. -- and that end user is picked to an IXC, 22 KMC can provide the tandem switching, 23 tandem transport, and -- and office 24 switching and office -- and common 25 transport function, and then transport the</p>	<p>Page 36</p> <p>1 Q. So what you're telling me is it could be 2 provisioned through your own facilities, 3 that you do have end users that have, as 4 their last mile, pure KMC network? 5 A. We do. 6 Q. Do you know what percentage of your 7 customer basis has a KMC network all the 8 way through? 9 A. I believe that that number is somewhere 10 around 40 percent. 11 Q. I'm going to show you what's going to be 12 marked as Exhibit 22 and -- collectively 13 marked as Exhibit 22. 14 (DEPOSITION EXHIBIT NO. 22 WAS MARKED.) 15 Q. And I represent again to you that I got 16 this off of your website, but I've 17 highlighted the phrase tandem access, and 18 I was wondering if you could describe to 19 me what that is referring to? 20 A. This is under utility and power on our 21 website? 22 Q. Yes. 23 A. Okay. 24 Q. And the second page -- 25 A. Was under IXC.</p>
<p>Page 35</p> <p>1 traffic from KMC's switch to the IXC's 2 point of presence. 3 Q. So in that instance, the last mile, I 4 think-- I don't know if they used the word 5 loop with the last mile reference. In 6 that situation, would you be purchasing 7 anything from BellSouth? 8 A. We might. 9 Q. Would you have -- 10 A. We purchase UNEs for last mile access from 11 BellSouth. 12 Q. And when you're using the phrase last 13 mile, are you referring to the last -- 14 the loop that you buy from BellSouth or 15 something that you provide independent of 16 BellSouth? 17 A. Again, as I understand it, my read on the 18 sentence is that what it's providing is 19 access, last mile access. So if KMC owns 20 an end user and the IXC is picked to that 21 end user, KMC can take the traffic from 22 its end user back to the IXC so the IXC 23 can carry that call long distance. KMC 24 may use UNEs or its own facilities, if 25 available, to provide that service.</p>	<p>Page 37</p> <p>1 Q. -- is under wireless. 2 A. Okay. And could you repeat your question? 3 Q. Yeah. My question is, what does tandem 4 access mean? 5 A. KMC provides tandem access, meaning that 6 it provides other carriers with an 7 opportunity to bring their traffic to KMC 8 so that KMC may deliver it to a 9 third-party carrier or a third-party 10 carrier's network on behalf of either this 11 wireless carrier or this utility and power 12 company. 13 Q. And in that instance, are you purchasing 14 services from BellSouth to provide the 15 tandem access? 16 A. I'm not sure what the specific network 17 architecture was in each of these 18 contemplated product offerings. My 19 understanding, because I am not the 20 engineer, is that this is KMC's network. 21 If it's BellSouth's network, if we were 22 taking this traffic to BellSouth, 23 BellSouth would be also providing tandem 24 access and would be responsible and have 25 the right to assess charges to these</p>

10 (Pages 34 to 37)

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1 carriers as it relates to their services.
2 Q. So as far as your understanding goes as to
3 the tandem access as it's referred to in
4 the wireless carrier website page and the
5 power and utility page, you're referring
6 to a service that KMC is providing
7 independent of BellSouth?
8 A. Independent of BellSouth.
9 Q. Okay. The next exhibit we'll mark as 25.
10 THE COURT REPORTER: 23.
11 MR. MEZA: Thank you.
12 (DEPOSITION EXHIBIT NO. 23 WAS MARKED.)
13 Q. Again, it's taken from your website.
14 (PAUSE.)
15 Q. I'm going to have to ask you to place it
16 down --
17 A. Oh, I'm sorry.
18 Q. -- so I can read it because I only have
19 one copy.
20 A. I'm sorry.
21 Q. That's okay.
22 What is KMC carrier terminating
23 access service, as it's referred to on
24 this web page?
25 A. Just to clarify, this is KMC's wholesale

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1 service offering. And it basically
2 includes the provision of -- the
3 provision of access services for IXCs.
4 Q. So, for instance, an IXC would purchase on
5 a wholesale basis from you a long distance
6 or intra-LATA toll route or something? Is
7 that how it would work?
8 How would it work? I guess I
9 should probably phrase it that way.
10 A. As you know, KMC has about 2,300 route
11 miles of fiber throughout its network, and
12 it does have fiber between IXC points of
13 presence and KMC's switch. This product
14 offering provides an opportunity for KMC
15 to use its facilities in order to help
16 IXCs originate and terminate, if it is
17 delivered traffic, between markets.
18 Q. What about fiber with local access, what
19 is that?
20 A. Again, it refers to our fiber facilities
21 between IXC points of presence and KMC's
22 switch.
23 Q. It's limited to that scenario, an IXC POP
24 and a KMC switch?
25 A. I don't recall any instance where we're

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1 carrying IXC traffic from an ILEC central
2 office, but, again, I'm not the product
3 manager for these services.
4 Q. Okay. Show you Exhibit 24.
5 (DEPOSITION EXHIBIT NO. 24 WAS MARKED.)
6 Q. Refer you to KMC carrier transit service.
7 A. The transport service?
8 Q. Transport -- Transport service. I'm
9 sorry.
10 What is that?
11 A. We've had a great marketing team. They,
12 again, describe the same service. Among
13 other full-service features, KMC carrier
14 transport wholesale service supports your
15 broadband transport needs by providing a
16 dedicated, fiber-optic connection between
17 your POP and KMC's central office.
18 Q. It says -- It's talking about the IXC to
19 KMC switch?
20 A. Right.
21 Q. Okay. So there's a lot of different
22 phrases or -- that are essentially the
23 same service?
24 A. Correct.
25 Q. Okay.

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1 A. Much of that often has to do with how much
2 bandwidth a carrier needs. A carrier may
3 not need a full fiber facility at DS-3.
4 Q. Uh-huh.
5 A. They may want to terminate usage on a
6 permitted use basis, so...
7 Q. Do you agree with the general concept that
8 an end user is the ultimate user of a
9 telecommunications service?
10 A. I do not.
11 Q. Why not?
12 A. Because there have been specific
13 references to ISPs being included as end
14 users for the purchase of local PRIs out
15 of local tariffs.
16 Q. Other than an ISP, are you aware of any
17 other customer you may have that would not
18 be considered an end user?
19 A. Wholesale customers.
20 Q. Fair enough. As it relates to BellSouth's
21 obligations to provide UNEs to you, such
22 that you are not providing wholesale
23 services, are you aware of any type of
24 customer that you have that would not
25 constitute an end user?

<p style="text-align: right;">Page 42</p> <p>1 A. Are you limiting your question to 2 customers that I currently have, or are 3 you limiting your question -- is your 4 question related to customers that I could 5 have or that the Act contemplates I could 6 use? 7 Q. Currently use. Currently. 8 A. Could you repeat your question? 9 Q. Sure. Are you aware of any type of 10 customer that you currently have that 11 would not be considered an end user? 12 A. Again, is your question -- it appeared 13 that your initial question might have been 14 limited to customers that I have that I am 15 using UNEs for? 16 Q. Uh-huh. Yes. That is -- I really 17 don't -- Maybe we can clear this up. I'm 18 not referring to your wholesale services, 19 unless I specifically ask you about them. 20 A. Right. But I may also buy special access 21 services from BellSouth and may not be 22 using UNE for -- if you'd please -- 23 Q. Sure. Why -- let's see. 24 Are you aware of any customer that 25 you are serving via BellSouth UNEs that</p>	<p style="text-align: right;">Page 44</p> <p>1 service offering. And I could give an 2 example. 3 Q. Sure. 4 A. If, for example, ITC DeltaCom decided that 5 now that -- If -- decided that in order 6 to ameliorate switching customers on their 7 network, on -- UNE-P customers, they would 8 like to purchase switching from KMC and 9 they would like for KMC to deliver a 10 resold turnkey service, I could purchase a 11 loop from BellSouth, a UNE loop. I could 12 use KMC's transport and KMC's switching 13 and deliver a service that I will resell 14 to ITC DeltaCom who will sell it to a 15 customer. And the Act itself provides for 16 wholesale UNEs. 17 Q. In that instance, would you mark up the 18 loop that you would be reselling to 19 DeltaCom? 20 A. I would not contemplate -- though I'm not 21 in pricing, I'm not in marketing, and that 22 is not a current product offering that we 23 have, I would not contemplate us providing 24 an elemental service. I would contemplate 25 that we would provide a finished price for</p>
<p style="text-align: right;">Page 43</p> <p>1 would not be considered an end user? 2 A. Not that I can recall. And you did say 3 other than ISPs? 4 Q. Other than ISPs, correct. And are you 5 aware that BellSouth has offered to 6 include ISPs as end users in this 7 agreement? 8 A. I am. 9 Q. Would that alleviate your concerns as to 10 whether or not a customer or an end user 11 is referred to regarding how UNEs can be 12 -- or who UNEs can be provisioned to? 13 A. It would not. 14 Q. Why not? 15 A. Because the Act requires an unbundling 16 obligation for the UNEs for use for 17 delivery of telecommunication services. 18 Telecommunication services contemplates 19 those services that are available directly 20 to the public for use or that may 21 otherwise be available such that they 22 should be considered directly available to 23 the public for use. I take those terms to 24 mean that I could use a UNE that I 25 purchased from BellSouth in a wholesale</p>	<p style="text-align: right;">Page 45</p> <p>1 a finished service. 2 Q. Would it be fair to say that in that 3 instance, DeltaCom could also purchase the 4 loop from BellSouth? 5 A. It would be fair to say, though if I'm 6 also providing the switching and all the 7 other finishing elements of the service in 8 order to maintain quality control, 9 maintain the network, and perform 10 maintenance, it might likely be easier 11 that I have control over ordering, 12 provisioning, and maintenance and direct 13 access through the UNE loop myself. 14 Q. Are you familiar with the phrases 15 qualifying and nonqualifying service? 16 A. From the context of the Triennial Review 17 Order? 18 Q. Yes. 19 A. Yes. 20 Q. And do you know what they are? 21 A. I don't remember the definition exactly, 22 but if there's a copy of the Triennial 23 Review, I could reference it. 24 Q. Do you know what they generally referred 25 to?</p>

12 (Pages 42 to 45)

<p style="text-align: right;">Page 46</p> <p>1 A. Generally, they were very broad. 2 Q. Do you know if there's any limitations as 3 to what types of services or when you can 4 resale wholesale services or wholesale -- 5 or when you can resell UNEs? 6 A. If there's a copy of the Triennial Review, 7 it would be great if I could just have a 8 look at it. 9 Q. It's that big document right there. 10 Underneath it. 11 A. Do you recall the paragraph where the 12 qualifying services definition is 13 referenced? 14 Q. No. Let me see if I can ask it a 15 different way without taking time to go 16 through that. 17 A. Okay. 18 Q. Do you know if the agreement -- that the 19 parties have agreed to provisions as to 20 how KMC will be allowed to resell 21 wholesale services they purchase from 22 BellSouth? 23 A. Could you repeat your question? 24 Q. Do you know if the parties have already 25 agreed to provisions regarding how KMC</p>	<p style="text-align: right;">Page 48</p> <p>1 UNEs for wholesale services. 2 However, when you go to specific 3 language references, if we are forced to 4 include a definition of end user that 5 explicitly excludes wholesale services, 6 one could infer that what we've, in 7 essence, agreed to is to limit even this 8 section, this provision 1.2, by using a 9 definition that explicitly excludes 10 wholesale services. 11 Q. So you believe that you need the further 12 safeguards of expanding who can -- who 13 you can serve to preserve your rights 14 under the Act; is that right? 15 A. What I believe is that a definition of end 16 user that does not include all -- all 17 uses contemplated under the Triennial 18 Review and the Act actually limits my 19 rights. 20 So I don't believe that including 21 wholesale expands it. I believe that 22 including wholesale accurately represents 23 the obligation and the ability and the 24 right to access these UNEs. 25 Q. Are you suggesting that BellSouth is going</p>
<p style="text-align: right;">Page 47</p> <p>1 will be allowed to resell wholesale 2 services they purchase from BellSouth? 3 A. It's my understanding that there is an 4 open issue, the definition of end users 5 specifically, that is impacted by -- that 6 it implicates whether or not BellSouth's 7 position is that we can utilize UNEs for 8 wholesale or not. 9 Q. Okay. If you refer to section 1.2 of 10 attachment 2. I believe you passed it 11 up. Attachment 2 isn't marked on the top. 12 A. Oh, okay. That's why. You said which 13 section, I'm sorry? 14 Q. Attachment 2, section 1.2. 15 A. Okay. 16 Q. Do you know if this section addresses 17 KMC's right to resell wholesale services? 18 A. In and of itself? 19 Q. Yes. 20 A. No. 21 Q. What do you think this section refers to? 22 A. This section refers to KMC's ability to 23 utilize UNEs to offer qualifying versus 24 nonqualifying services, which does have an 25 implication as it relates to the use of</p>	<p style="text-align: right;">Page 49</p> <p>1 to use the definition of end user to 2 prohibit your rights as set forth in 3 section 1.2? 4 A. The language as proposed with it would do 5 exactly that. 6 Q. And why do you believe that? 7 A. Because the language as proposed limits 8 end user to the ultimate user of the 9 telecommunications service, which, by 10 definition's strict adherence, would not 11 include wholesale services. 12 (PAUSE.) 13 Q. Do you know how many times you've been 14 sued by an end user -- your end user? 15 A. Not directly, I don't have an exact 16 number. 17 Q. Do you know how many times an end user has 18 filed a claim in a court of law against 19 KMC? 20 A. I don't have an exact number. I do know 21 that I have been sued by end users. 22 Q. Can you please describe why you believe 23 that to be the case? 24 A. General discussion with my colleagues at 25 work, the associate general counsel.</p>

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1 Q. Do you know if, in that instance, KMC
2 sought to bring BellSouth into the
3 lawsuit?
4 A. In no instance, that I can recall, has KMC
5 sought to bring BellSouth into any
6 customer-initiated complaints or lawsuits.
7 Q. Are you aware if the reason for the
8 lawsuit was or could have been based on
9 services that BellSouth was providing to
10 KMC?
11 MR. CAMPEN: Objection to the form
12 of the question.
13 A. Yes.
14 Q. Can you explain that, please?
15 A. I know that KMC has been sued by a
16 customer due to an outage.
17 Q. And what happened in that instance?
18 A. When you reference "what happened", are
19 you asking what happened to -- how did we
20 resolve the customer?
21 Q. Okay. I want to know what happened to
22 result in the outage and how was the
23 lawsuit resolved?
24 A. I cannot recall the specifics as to what
25 caused the outage. Actually, I cannot

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1 recall how we -- how we closed the issue,
2 either.
3 Q. Do you remember any other instance?
4 A. Not directly, not specifically.
5 Q. When you say "directly" or "specifically",
6 do you have any indirect knowledge of any
7 other instance?
8 A. Any other instance?
9 Q. In which an end user sued KMC for services
10 that KMC provided to them that they
11 purchased from BellSouth?
12 A. Not specifically.
13 Q. Do you have any indirect knowledge of any
14 other instances?
15 A. When you say BellSouth, are you limiting
16 it to BellSouth -- BellSouth as the
17 regulated telecom carrier?
18 Q. Yes.
19 A. Because we have the yellow pages
20 instances.
21 Q. I'm talking about the underlying wholesale
22 telecommunication services.
23 A. Not that I can recall.
24 Q. Okay. I'd like to focus your attention to
25 Exhibit 4. Well, that's not what I was

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1 referring to --
2 A. Okay.
3 Q. -- Exhibit 4, the general terms and
4 conditions. Is that Exhibit 5? Here it
5 is. 5 actually. It will be the single
6 sheet here, 5.
7 I'm showing you what's been marked
8 as Exhibit 5, and it is an attachment to
9 your supplemental direct testimony here in
10 North Carolina, and it represents the
11 proposed changes, proposed language that
12 KMC has offered for section 10.4.1.
13 Do you see that?
14 A. I do.
15 Q. Can you please explain to me how you
16 envision this limitation of liability
17 language to work?
18 A. Okay. The fundamental construct of this
19 provision is to place a cap on the amount
20 of financial exposure that either
21 BellSouth or KMC would be exposed to in
22 the event -- in an event -- in the event
23 that we had a claim for damages. That cap
24 is designed to match revenue with risk.
25 As such, we recommended a cap of

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1 7-1/2 percent. That's substantially lower
2 than you might find in some other
3 industries and similar provisions. And
4 the objective of the language that we've
5 proposed, we cut through the 30 lines of
6 text, is to match revenue with risk and to
7 place a cap, as appropriate, on the
8 financial risk associated with damages.
9 Q. And is it your intention that this cap
10 would apply only to actions between the
11 parties?
12 A. I can only contract on behalf of KMC.
13 Q. And you've stated that this 7-1/2 percent
14 is less than what you'd see in another
15 commercial context; is that right?
16 A. Correct.
17 Q. Did you review any other contracts prior
18 to filing your testimony?
19 A. We actually hired counsel to research this
20 issue for us and present us with examples.
21 Q. And did you review those examples?
22 A. Right.
23 Q. You've actually reviewed contracts?
24 A. I've reviewed these provisions from those
25 contracts.

<p style="text-align: right;">Page 54</p> <p>1 Q. How were they transmitted to you?</p> <p>2 A. When you say, how were they transmitted --</p> <p>3 Q. Yeah. I mean, did you receive excerpts of</p> <p>4 contracts, did you see case law? What did</p> <p>5 you look at specifically from counsel</p> <p>6 to --</p> <p>7 A. Primarily case law, restates on some of</p> <p>8 the law.</p> <p>9 Q. Did you review any construction contracts?</p> <p>10 A. Excerpts within the bodies of -- what</p> <p>11 I'll call legal reference materials that</p> <p>12 we reviewed in order to establish what was</p> <p>13 customary for these types of provisions.</p> <p>14 Q. Was that before or after you filed your</p> <p>15 testimony?</p> <p>16 A. It was before.</p> <p>17 Q. The language that you're proposing in the</p> <p>18 7-1/2 percent cap, have you seen that</p> <p>19 language in any other interconnection</p> <p>20 agreement?</p> <p>21 A. I have not.</p> <p>22 Q. Are you proposing a similar type language</p> <p>23 in any of your pending or concluded</p> <p>24 arbitration proceedings in other states?</p> <p>25 A. We are not.</p>	<p style="text-align: right;">Page 56</p> <p>1 A. 21 -- what is it, whatever 25 --</p> <p>2 whatever amount of revenue represents.</p> <p>3 Whatever 25 days of revenue times 7-1/2</p> <p>4 percent would be.</p> <p>5 Q. When you mean "revenue", whose revenue?</p> <p>6 A. As I recall, it is -- let me use the term</p> <p>7 aggregate fees, charges, or other amounts</p> <p>8 paid or payable.</p> <p>9 Q. "Paid or payable", what does that mean to</p> <p>10 you?</p> <p>11 A. Either the amounts have been remitted or</p> <p>12 they are due.</p> <p>13 Q. Do you consider amounts that have yet to</p> <p>14 be billed to be due?</p> <p>15 A. No.</p> <p>16 Q. So on day 25, would it be your</p> <p>17 interpretation of the provision that</p> <p>18 you're referring to that -- and presume</p> <p>19 with me that BellSouth has not issued a</p> <p>20 bill yet -- would you believe that the</p> <p>21 total liability would be zero?</p> <p>22 A. Yes.</p> <p>23 Q. Now, what happens if on day one the claim</p> <p>24 arose and the claim continues for the</p> <p>25 entire term of the contract. KMC finds</p>
<p style="text-align: right;">Page 55</p> <p>1 Q. Would you agree with me that -- and I'm</p> <p>2 paraphrasing -- the 7-1/2 percent cap is</p> <p>3 determined by when the day the claim</p> <p>4 arose?</p> <p>5 A. The language we proposed explicitly states</p> <p>6 that the term here of an amount equal to</p> <p>7 7-1/2 percent of the entire term hereof,</p> <p>8 an amount equal to -- I'm sorry, the</p> <p>9 aggregate fees, charges, or other amounts</p> <p>10 paid or payable to such party for any and</p> <p>11 all services provided to the -- provided</p> <p>12 by such party pursuant to this agreement</p> <p>13 as of the day on which the claim arose.</p> <p>14 Q. What does "when the claim arose" mean to</p> <p>15 you?</p> <p>16 A. When the claim arose means to me the date</p> <p>17 that the incident, which the claim relates</p> <p>18 to, arose.</p> <p>19 Q. Presume for me that on day one something</p> <p>20 happens, a claim -- and you have a claim.</p> <p>21 Under your interpretation of this</p> <p>22 provision, what would BellSouth's total</p> <p>23 exposure be?</p> <p>24 A. Nothing.</p> <p>25 Q. What about day 25?</p>	<p style="text-align: right;">Page 57</p> <p>1 out on the last day of this claim. When,</p> <p>2 in your mind, would constitute the day the</p> <p>3 claim arose?</p> <p>4 A. Day one.</p> <p>5 Q. Why is that?</p> <p>6 A. Because that's the date the incident</p> <p>7 occurred.</p> <p>8 Q. And would -- in that instance, what would</p> <p>9 BellSouth's total liability be under that</p> <p>10 provision?</p> <p>11 A. If no invoice was due, zero.</p> <p>12 MR. MEZA: Let's take a break.</p> <p>13 (RECESS.)</p> <p>14 BY MR. MEZA:</p> <p>15 Q. Ms. Johnson, do you know if KMC has a</p> <p>16 provision in its tariff that provides that</p> <p>17 it is not liable for the acts of any third</p> <p>18 party or service provider?</p> <p>19 A. KMC does.</p> <p>20 Q. Do you know if KMC has a provision in its</p> <p>21 tariff that provides that it is not making</p> <p>22 any warranties or representations, express</p> <p>23 or implied?</p> <p>24 A. KMC does.</p> <p>25 Q. Does KMC provide any service or quality</p>

15 (Pages 54 to 57)

<p style="text-align: right;">Page 58</p> <p>1 guarantees to its customers?</p> <p>2 A. KMC does.</p> <p>3 Q. It does?</p> <p>4 A. It does.</p> <p>5 Q. Can you please describe those?</p> <p>6 A. It may vary, depending on the service</p> <p>7 offering and the particular contract.</p> <p>8 Q. For those non-wholesale services that</p> <p>9 you're providing, what type of service</p> <p>10 guarantees do you provide?</p> <p>11 A. Are you referencing service guarantees or</p> <p>12 service outage provisions?</p> <p>13 Q. I'm referencing some type of provision</p> <p>14 that says, you know, 30 days you get your</p> <p>15 money back or if at any time you're not</p> <p>16 happy, we'll credit you, you know, the</p> <p>17 amounts that we billed you or something</p> <p>18 like that.</p> <p>19 A. I'm not aware that our tariffs include any</p> <p>20 service guarantees. KMC does have service</p> <p>21 outage provisions. In the event there are</p> <p>22 outages, KMC provides credits.</p> <p>23 Q. And is that the total extent of liability</p> <p>24 that KMC will experience in the event of a</p> <p>25 service outage, according to the tariff?</p>	<p style="text-align: right;">Page 60</p> <p>1 anything other than credits or services</p> <p>2 provided, even in the event that the harm</p> <p>3 is caused by gross negligence or willful</p> <p>4 misconduct?</p> <p>5 A. Just a minute. Could I have a moment, if</p> <p>6 you don't mind?</p> <p>7 Q. Sure. Absolutely.</p> <p>8 A. Because there are other related</p> <p>9 provisions --</p> <p>10 Q. Absolutely. Take your time.</p> <p>11 A. -- that H cannot be read without</p> <p>12 including.</p> <p>13 (PAUSE.)</p> <p>14 A. Okay.</p> <p>15 Q. After reading that provision and the other</p> <p>16 provisions that you looked at, is it your</p> <p>17 interpretation of that language to mean</p> <p>18 that KMC's total liability, regardless of</p> <p>19 whether the harm was caused by gross</p> <p>20 negligence or willful misconduct, is a</p> <p>21 credit for services lost?</p> <p>22 A. Actually, the language in our North</p> <p>23 Carolina service terms and conditions</p> <p>24 specifically states that it shall, in no</p> <p>25 event, exceed the sums actually paid to</p>
<p style="text-align: right;">Page 59</p> <p>1 A. It depends on the cause, whether it -- a</p> <p>2 third party caused the outage or if there</p> <p>3 is an incident of gross negligence or</p> <p>4 willful misconduct.</p> <p>5 Q. Is it your understanding that KMC's tariff</p> <p>6 provisions relating to limitation of</p> <p>7 liability does not apply to incidents of</p> <p>8 gross negligence or willful misconduct?</p> <p>9 A. Not expressly.</p> <p>10 Q. What does that mean, "not expressly"?</p> <p>11 A. As I recall our tariff provisions, they</p> <p>12 don't expressly limit any liability in</p> <p>13 gross negligence and willful misconduct.</p> <p>14 Q. Let me show you what I'm going to mark as</p> <p>15 Exhibit 25. I represent to you this is</p> <p>16 your North Carolina intrastate service</p> <p>17 terms and conditions that we got off your</p> <p>18 website, and refer you to provision</p> <p>19 2.1.4(H).</p> <p>20 (DEPOSITION EXHIBIT NO. 25 WAS MARKED.)</p> <p>21 (PAUSE.)</p> <p>22 Q. Finished?</p> <p>23 A. I am.</p> <p>24 Q. Under your reading of that provision, do</p> <p>25 you believe that KMC would be liable for</p>	<p style="text-align: right;">Page 61</p> <p>1 KMC Telecom by the customer for the</p> <p>2 specific services giving rise to the</p> <p>3 claim.</p> <p>4 Q. So even if the action giving rise to the</p> <p>5 claim was the result of gross negligence</p> <p>6 or willful misconduct, your tariff says</p> <p>7 that your total exposure would be the</p> <p>8 total amount that's paid for the services?</p> <p>9 A. Correct.</p> <p>10 Q. Okay. Does KMC intend to remove or modify</p> <p>11 its limitation of liability language that</p> <p>12 currently exists in its tariffs or on its</p> <p>13 website?</p> <p>14 A. There are no plans to modify that</p> <p>15 language.</p> <p>16 Q. I'd like for you to look -- if you flip</p> <p>17 Exhibit 5 over, you'll see BellSouth's</p> <p>18 proposed language for limitation of</p> <p>19 liability. And I'd like for you to read</p> <p>20 that and determine if you think that</p> <p>21 BellSouth's proposed language is at or</p> <p>22 near the standard in the industry, the</p> <p>23 telecom industry, for interconnection</p> <p>24 agreements regarding limitation of</p> <p>25 liability language.</p>

16 (Pages 58 to 61)

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1 (PAUSE.)
2 A. I cannot answer the question as it relates
3 to generally, because I am only familiar
4 with the tariffs that we purchase services
5 from or the tariff that we provide
6 directly. I have seen this language or
7 similar language in tariffs.
8 Q. Is it similar to your own language?
9 A. BellSouth's language limits the credit to
10 the actual cost of the service or
11 function, whereas KMC's language limits
12 the recovery to the amounts paid to KMC
13 for services that give rise to the claim.
14 Q. And would it also be fair to say that
15 BellSouth -- BellSouth's language carves
16 out gross negligence or willful misconduct
17 and KMC's tariffed language does not?
18 A. That is also safe to say.
19 Q. What's your understanding of what
20 indirect, consequential, or incidental
21 damages are?
22 A. I'd like to offer an example.
23 Q. Sure. Absolutely.
24 A. If KMC had a customer that operated an
25 inbound sales call center and KMC serviced

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1 this customer via BellSouth's UNE services
2 and due to some fault of BellSouth's,
3 whether willful or negligent or otherwise,
4 those services are disrupted and KMC is
5 not able to provide service to its
6 customer as a result of this inbound sales
7 center, is not able to receive sales
8 calls, this customer's loss of revenue is
9 a direct result of its phone service not
10 being operable.
11 If the sales call center customer
12 had a customer that worked in California
13 and was calling in to order a computer and
14 wasn't able to order it that day, and as a
15 result of it they weren't able to get
16 their work done that day, that would be
17 indirect.
18 Q. Okay.
19 A. But the customer who's the customer that
20 we are directly providing service to, his
21 damages would be as a direct consequence
22 of his service being out.
23 Q. In your tariffs or in your contract, is
24 KMC liable for indirect, consequential, or
25 incidental damages from its end users?

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1 A. No.
2 Q. I'd like for you to look at Exhibit 13
3 again, paragraph -- or section 10.4.4,
4 the general terms and conditions.
5 A. Could you please provide the paragraph
6 reference?
7 Q. Yes, ma'am. 10.4.4.
8 (PAUSE.)
9 Q. And when you're done, I'd like for you to
10 explain to me your interpretation of how
11 10.4.4 is intended to work.
12 (PAUSE.)
13 A. This provision acts to provide language
14 that protects the consumer's rights. My
15 understanding of this language is that
16 it's proposed in order to confirm between
17 the parties that we are not going to limit
18 the rights of end users, as the term is
19 used in this proposal, to recover direct
20 damages if they are harmed as a result of
21 either of our -- either party to this
22 agreement, being KMC or BellSouth's
23 failure to provide service in accordance
24 with the terms. So it serves to ensure
25 that end-user rights are not -- are not

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1 limited in any way.
2 Q. All right. You're a lawyer; correct?
3 A. Correct.
4 Q. Is there any legal theory that you're
5 aware of that allows parties to a contract
6 to effect the rights of a third party?
7 A. It's my position that there isn't.
8 Q. Then why is this provision even in
9 arbitration?
10 A. It's in arbitration because it was
11 included in the negotiations, and we did
12 not agree on the provisions. As such,
13 we've brought it to the Commission to
14 consider.
15 Q. Do you think that language -- the bolded
16 language you're proposing is binding upon
17 your end users?
18 A. We provided the language in order to
19 negotiate language, I believe, in response
20 to BellSouth's request that we
21 specifically limit the end-users rights.
22 Q. I'd like for you to look at BellSouth's
23 version of 10.4.4. It should be right
24 underneath.
25 A. Okay.

<p style="text-align: right;">Page 66</p> <p>1 Q. And tell me if you see anywhere where 2 BellSouth is recommending that the rights 3 of an end user are effected in any way 4 with its proposed language? 5 A. The language varies slightly because 6 BellSouth's proposed language addresses 7 indirect, incidental, or consequential 8 damages. 9 Q. Uh-huh. 10 A. Whereas the language proposed above 11 specifically and explicitly addresses 12 results, damages resulting directly and in 13 a reasonably foreseeable manner from the 14 first party's performance of services 15 hereunder and that were not and are not 16 directly and proximately caused by or the 17 result of such party's failure to act in 18 time and a commercially reasonable 19 manner. 20 So in the first instance, the 21 language that says customer -- begins 22 with customer, I believe CLEC's proposed 23 language, it appears that the language is 24 presented in order to make sure that the 25 terms are comprehensive.</p>	<p style="text-align: right;">Page 68</p> <p>1 a contract, I cannot effect the rights of 2 a third party. 3 Q. Do you know in those proceedings in -- 4 that you're arbitrating with Sprint and 5 SBC if you have proposed a similar 6 provision to 10.4.4? 7 MR. CAMPEN: Objection. That's 8 been asked and answered early on in the 9 deposition. 10 MR. MEZA: This is a different 11 provision. 12 MR. CAMPEN: Okay. I'm sorry, I 13 thought it was this one. 14 A. I can't recall the language exactly used 15 in those arbitrations. I will say the 16 concept is one that we consistently 17 uphold, and that is to not include 18 language in our interconnection agreements 19 that purports to limit the rights of third 20 parties. 21 Q. And you think that's necessary, 22 notwithstanding your understanding of the 23 law? 24 A. It becomes necessary when language is 25 proposed to us that purports to limit</p>
<p style="text-align: right;">Page 67</p> <p>1 BellSouth's terms, again, as 2 proposed, only address indirect, 3 incidental, or consequential damages, and 4 there may be some disagreement or lack of 5 clarity as to what is an indirect, 6 incidental, or consequential damage. 7 The language Joint Petitioners 8 propose makes it clear that these types of 9 instances should be addressed as we've 10 proposed. 11 Q. Is it your intention with the proposal 12 that you're offering in 10.4.4 that 13 BellSouth be liable to your end users for 14 indirect, consequential, or incidental 15 damages? 16 A. It is our intention that the language be 17 clear that we're not limiting or 18 purporting to limit via this contract 19 those rights of the end user. 20 Q. Whatever they may be? 21 A. Whatever they may be. 22 Q. And you agree with me that, as two parties 23 to a contract, we can't effect the rights 24 of a third party? 25 A. It is my position that, as two parties to</p>	<p style="text-align: right;">Page 69</p> <p>1 those end-user rights or third-party 2 rights. 3 Q. So let's play it out. You have an end 4 user who, for some reason, has a service 5 outage. They come to KMC. And under the 6 tariff -- your tariff, their liability is 7 limited to the amounts that they've paid 8 for the services that went out; correct? 9 A. To the extent my tariff is enforceable and 10 there's no other law that might provide 11 them a remedy. 12 Q. The answer would be correct; yes? 13 A. It's hard for me to say absolutely, 14 because there may be other remedies that 15 are available to them under the law. I 16 will use a yellow pages example. In some 17 instances, some states do not allow you to 18 limit via your tariffs, your liabilities. 19 So that provision in my tariff would not 20 stand. The customer would have access 21 under the law to additional remedies. 22 Q. Can you please provide me with a specific 23 instance where a KMC tariff provision has 24 been found to be invalid? 25 A. That is an example. The yellow pages</p>

<p style="text-align: right;">Page 70</p> <p>1 listing, KMC made an error in a 2 transmission of a yellow pages listing and 3 our tariff purported to limit our 4 liability in that instance, but the 5 actual -- or the applicable law within 6 the state provided additional relief for 7 the consumer, and KMC honored the 8 applicable law. 9 Q. What state was that? 10 A. I believe it was Florida. 11 Q. But under your tariff, you would not be 12 liable for indirect, consequential, or 13 incidental damage, is that right, to your 14 end user? 15 A. Assuming my tariff was not -- was 16 consistent with applicable law and was not 17 superseded in some way by the law. 18 Q. You believe your tariffs are inconsistent 19 with the law? 20 A. As noted in the example in Florida, the 21 law did not allow me by tariff to limit 22 that consumer's rights. 23 Q. Have you changed your tariff in Florida? 24 A. I can't recall. 25 Q. All right. Well, getting back to my</p>	<p style="text-align: right;">Page 72</p> <p>1 A. Regardless of what we say in this 2 contract. 3 Q. Look at section 10.5 for me. 4 (PAUSE.) 5 A. Okay. 6 Q. Would it be fair to say that, under your 7 proposed language, KMC or the party 8 providing services would indemnify 9 Bell -- excuse me, strike that. 10 Would it be fair to say that 11 BellSouth would indemnify KMC for acts of 12 negligence resulting from BellSouth's 13 actions? 14 A. If BellSouth provided services to KMC and 15 in BellSouth's provisioning of those 16 services BellSouth failed to abide by the 17 law or BellSouth intentionally committed 18 misconduct or gross negligence, then 19 BellSouth would indemnify KMC as a 20 recipient of the services against 21 third-party claims for BellSouth's 22 negligence, willful misconduct, or failure 23 to conform to the terms of the agreement. 24 Q. Okay. 25 A. And vice versa, if KMC provided services</p>
<p style="text-align: right;">Page 71</p> <p>1 hypothetical. Your end user would not be 2 able to obtain indirect, consequential, 3 incidental damages against you pursuant to 4 your tariff. 5 As between BellSouth and KMC, we 6 would not recover indirect, consequential, 7 or incidental damages between ourselves; 8 is that right? 9 A. Correct. 10 Q. But your end user -- and what you're 11 attempting to do is to say that your end 12 user may be able to obtain indirect, 13 consequential, or indirect damages or any 14 type of damages against BellSouth? 15 A. What we're attempting to say is, what we 16 both agree, that the end user is not a 17 party to this contract, as such I can't 18 contract on the end user's behalf. As 19 such, I cannot purport to limit their 20 rights in any way. So the end user would 21 be able to avail itself of any third-party 22 remedies that might be available to it 23 under the law. 24 Q. Regardless of what we say in this 25 contract?</p>	<p style="text-align: right;">Page 73</p> <p>1 to BellSouth. 2 Q. Is it your intention with this provision 3 to have the limitation of liability cap 4 apply to claims of negligence regarding 5 indemnification? 6 A. Could you repeat your question, please? 7 MR. MEZA: Could you read back my 8 question? I'm sorry. Sorry. 9 (THE COURT REPORTER READ BACK THE 10 REQUESTED PORTION OF THE RECORD.) 11 A. No. 12 Q. So would the cap apply to a claim of 13 indemnification for claims of negligence 14 or not? 15 A. No. 16 Q. If a service outage occurs, KMC end user 17 makes a claim against KMC and your tariff 18 is upheld, the amount of damages that you 19 are required to pay is cost of the 20 services -- excuse me, the services paid; 21 right? 22 A. Please repeat your question. 23 Q. Okay. If an end user claims that their 24 service is out for three days, what is 25 their right against KMC, according to your</p>

<p style="text-align: right;">Page 74</p> <p>1 tariff?</p> <p>2 A. Depending on the cause of the outage,</p> <p>3 assuming that the cause of the outage was</p> <p>4 one of the reasons set forth in KMC's</p> <p>5 tariff, that KMC will provide a service</p> <p>6 outage credit then.</p> <p>7 Q. If it's not one of those enumerated items,</p> <p>8 would the customer have any recourse?</p> <p>9 A. It would not. For example, if -- in</p> <p>10 Florida when the hurricanes hit, we would</p> <p>11 not provide credits if our service was out</p> <p>12 due to acts of God.</p> <p>13 Q. So the customer would get a credit from</p> <p>14 KMC; correct?</p> <p>15 A. Correct.</p> <p>16 Q. And under BellSouth's proposal for</p> <p>17 limitation of liability, BellSouth would</p> <p>18 give you a credit for your cost?</p> <p>19 A. Correct.</p> <p>20 Q. In that instance, would you have anything</p> <p>21 to claim against BellSouth via this</p> <p>22 indemnification provision?</p> <p>23 A. Not in the instance you described.</p> <p>24 Q. Do you know if any of your end users have</p> <p>25 ever sued BellSouth?</p>	<p style="text-align: right;">Page 76</p> <p>1 generally with contract matters that arise</p> <p>2 and frequently bring claims under</p> <p>3 limitation of liability or indemnification</p> <p>4 provisions.</p> <p>5 Q. Any other instances or types of issues</p> <p>6 that you think a court of law would have a</p> <p>7 better expertise relating to</p> <p>8 implementation or interpretation of the</p> <p>9 agreement?</p> <p>10 A. Assignment provisions, perhaps. Without</p> <p>11 looking at the GTCs table of contents,</p> <p>12 it's hard to specify.</p> <p>13 Q. But the meat and bones of the agreement,</p> <p>14 the attachment 2s, the attachment 6s, the</p> <p>15 attachment 4s, attachment 7, do you</p> <p>16 believe that state commissions are the</p> <p>17 experts in those areas?</p> <p>18 A. I believe that state commissions are the</p> <p>19 experts in enforcing the 251 obligations.</p> <p>20 Q. Is KMC on its second- or third-generation</p> <p>21 contract currently with BellSouth?</p> <p>22 A. Third.</p> <p>23 Q. Do you know if any of the other contracts</p> <p>24 that KMC had with BellSouth allowed for</p> <p>25 KMC to bring a dispute to a court of law?</p>
<p style="text-align: right;">Page 75</p> <p>1 A. Not to my knowledge.</p> <p>2 Q. Do you agree that state commissions have</p> <p>3 authority to enforce and interpret</p> <p>4 interconnection agreements that they</p> <p>5 approve?</p> <p>6 A. I do.</p> <p>7 Q. You do?</p> <p>8 A. I do.</p> <p>9 Q. Do you agree state commissions have</p> <p>10 expertise to address issues relating to</p> <p>11 the interpretation or implementation of</p> <p>12 agreements that they approve pursuant to</p> <p>13 the Act?</p> <p>14 A. Most items within the agreements that they</p> <p>15 approve.</p> <p>16 Q. Are you aware of any items that they would</p> <p>17 not have expertise?</p> <p>18 A. As between a court of law and a public</p> <p>19 service commission, as an example, a court</p> <p>20 of law may have better expertise in</p> <p>21 interpreting and applying indemnification</p> <p>22 or limitation of liability provisions than</p> <p>23 the public service commission might have.</p> <p>24 Q. And why is that?</p> <p>25 A. Because in the court of law they deal</p>	<p style="text-align: right;">Page 77</p> <p>1 A. I believe the current contract does, but I</p> <p>2 can't recall specifically.</p> <p>3 Q. And it's your understanding that KMC has</p> <p>4 not -- has never sued BellSouth in a</p> <p>5 court of law?</p> <p>6 A. KMC has not, although KMC considered that</p> <p>7 as an option.</p> <p>8 Q. Instead of suing in a court of law, did</p> <p>9 KMC file a complaint at the public service</p> <p>10 commission?</p> <p>11 A. The parties resolved and settled the</p> <p>12 issues.</p> <p>13 Q. What is your understanding of the Doctrine</p> <p>14 of Primary Jurisdiction?</p> <p>15 A. One court handles the issue.</p> <p>16 Q. How would that work as it relates to this</p> <p>17 issue and what the Joint Petitioners are</p> <p>18 proposing?</p> <p>19 A. It depends on the complaint with the</p> <p>20 dispute arising out of the contract.</p> <p>21 Q. Okay. Let's say that KMC files -- wins</p> <p>22 this issue in all nine states. KMC files</p> <p>23 a lawsuit relating to BellSouth's</p> <p>24 obligations under attachment 2 in a</p> <p>25 provision of UNEs, okay. In addition, KMC</p>

<p style="text-align: right;">Page 78</p> <p>1 combines that lawsuit with a claim for -- 2 (INTERRUPTION.) 3 Q. Sorry. 4 MR. CAMPEN: Go ahead. Take your 5 time. 6 MR. MEZA: Off the record. 7 (DISCUSSION OFF THE RECORD.) 8 Q. Presume for me that KMC files a lawsuit 9 against BellSouth relating to BellSouth's 10 obligations in attachment 2. And in 11 addition, KMC also files an antitrust 12 claim against BellSouth. So you have a 13 breach of contract claim and you have an 14 antitrust claim, two counts in the 15 complaint. BellSouth files a 12(b)(6) 16 motion saying, Court, please refer 17 attachment 2 issues to the PSC. Would KMC 18 object to that deferral in that instance? 19 MR. CAMPEN: Objection. 20 Speculative. 21 MR. MEZA: Sure. 22 A. We might, depending on the specific 23 instance that gave rise to the breach. If 24 it's an interpretation as to BellSouth's 25 obligation to provide a particular UNE and</p>	<p style="text-align: right;">Page 80</p> <p>1 bifurcation because, as I understand 2 BellSouth's proposal, it would first have 3 to go and the commission would have to 4 render a ruling as to whether the 5 issue -- as to whether they would decide 6 the issue or send it to court. And then, 7 and only then, not by my motion, not by 8 BellSouth's motion, but by the 9 commission's decision, then and only then 10 could it be then referred to the court. 11 So from a timing perspective, by 12 definition or as I understood the 13 proposal, was subject to the public 14 service commission's receipt, hearing, and 15 rendering of its opinions as to whether or 16 not it should hear that issue and then it 17 was to be sent to the court. 18 Q. And are you basing it -- basing that on 19 BellSouth's most recent proposal for this 20 issue? 21 A. I believe that I was looking at 22 BellSouth's most recent proposal, but if 23 you can direct me to -- 24 Q. Yeah, please. Look at section 13.1 and 25 13.2.</p>
<p style="text-align: right;">Page 79</p> <p>1 the contract reference was generic and I 2 was looking for a legal forum where 3 someone could interpret the Act in order 4 to resolve the dispute, I might not 5 object. But if it was a provision that 6 said BellSouth will provide DS-1 and UNE 7 loops and BellSouth did not provide the 8 DS-1 UNE loop, that's a simple breach, and 9 I would believe that the court would be 10 competent to handle those issues. 11 Q. Would you agree with me that in the 12 instance when a court does refer matters 13 to the state commission pursuant to the 14 Doctrine of Primary Jurisdiction that that 15 deferral could result in the delay of the 16 resolution of the issue? 17 A. It may not delay the resolution. It would 18 be a bifurcated resolution of the issue. 19 Q. And that's one of the things that our 20 issues that the Joint Petitioners are 21 concerned about in BellSouth's proposal, 22 is that it results in the bifurcation of 23 issues; would that be correct? 24 A. In BellSouth's proposal, I actually think 25 it does result in a delay and a</p>	<p style="text-align: right;">Page 81</p> <p>1 MR. CAMPEN: For the record, the 2 witness is looking at Exhibit 13. 3 MR. MEZA: Yes. 4 (PAUSE.) 5 A. Okay. 6 Q. Is it your understanding after reading 7 that proposed language that it's 8 BellSouth's position that the commission 9 would determine whether the claim should 10 be brought before it before it could be 11 brought to a court of law? 12 A. Not on every issue. 13 Q. Now, there could be matters that the 14 parties agree that the issue lies outside 15 the expertise -- 16 A. Correct. 17 Q. -- or jurisdiction of the FCC or state 18 commission? 19 A. Correct. As stated in 13.2, there could 20 be matters. 21 Q. But getting back to my original question, 22 you would agree with me that bringing 23 matters -- all matters first to a court 24 of law could result in the bifurcation of 25 claims through the Doctrine of Primary</p>

21 (Pages 78 to 81)

<p style="text-align: right;">Page 82</p> <p>1 Jurisdiction?</p> <p>2 A. It could.</p> <p>3 Q. Okay. Now, what happens if one state</p> <p>4 says, KMC, you're right, you should be</p> <p>5 able to go to a court first and eight</p> <p>6 other states say, no, you need to come to</p> <p>7 us for areas that we have expertise in, so</p> <p>8 we're going to approve BellSouth's</p> <p>9 language. For that one state in which you</p> <p>10 have the right to go to a court of law and</p> <p>11 you obtain a judgment, is it your position</p> <p>12 that that judgment is applicable to the</p> <p>13 eight other states?</p> <p>14 A. Serves as precedence.</p> <p>15 Q. Would it be also your position that you</p> <p>16 would not have to litigate the issue in</p> <p>17 the eight other states?</p> <p>18 A. No. Just to clarify.</p> <p>19 Q. Sure.</p> <p>20 A. When you say a court, am I taking it to</p> <p>21 mean district court that has jurisdiction</p> <p>22 over the matter and this -- I'm going to</p> <p>23 ask to -- yeah. You know, it would</p> <p>24 really depend on how you brought the</p> <p>25 claim. If I brought the claim and asked</p>	<p style="text-align: right;">Page 84</p> <p>1 jurisdiction over matters where you don't</p> <p>2 have the right to go to court first?</p> <p>3 MR. CAMPEN: And that's your</p> <p>4 hypothetical --</p> <p>5 MR. MEZA: Yeah.</p> <p>6 MR. CAMPEN: -- versus one?</p> <p>7 MR. MEZA: Yeah.</p> <p>8 A. That's an interesting question simply</p> <p>9 because, theoretically, the way we file</p> <p>10 our agreements, we have nine agreements.</p> <p>11 So conceptually that one agreement would</p> <p>12 apply for that one state.</p> <p>13 Q. Right. I'd like to refer you to Exhibit</p> <p>14 1, page 47, lines 15 through 16.</p> <p>15 MR. CAMPEN: What's the page</p> <p>16 number?</p> <p>17 MR. MEZA: 47.</p> <p>18 Q. When you state that the basic legal</p> <p>19 tenet -- I'm starting on line 14 -- the</p> <p>20 basic legal tenet, that it should not be</p> <p>21 construed to limit a party's rights under</p> <p>22 applicable law, which should encompass all</p> <p>23 applicable law in existence at the time of</p> <p>24 contract, what does that mean?</p> <p>25 A. It means that if on May 1st, 2005,</p>
<p style="text-align: right;">Page 83</p> <p>1 the court to consider all nine states and</p> <p>2 restrictions on BellSouth in all nine</p> <p>3 states, it could be an instance maybe in</p> <p>4 federal district court.</p> <p>5 Q. Well, let's talk about that, because</p> <p>6 that's actually an interesting question.</p> <p>7 You have a multistate agreement, by its</p> <p>8 nature is not applicable. There are</p> <p>9 provisions that would not be applicable to</p> <p>10 all nine states.</p> <p>11 A. Correct.</p> <p>12 Q. And you would agree with me there is</p> <p>13 potential for some issues that we're</p> <p>14 arbitrating, we could get very</p> <p>15 inconsistent rulings from the nine state</p> <p>16 commissions regarding the same issue?</p> <p>17 A. Correct.</p> <p>18 Q. One of those inconsistent rulings may be</p> <p>19 regarding where we can bring a claim</p> <p>20 first. And in eight states, you have no</p> <p>21 right to go to a court of law. In one</p> <p>22 state, you do.</p> <p>23 Would it -- In your opinion, do</p> <p>24 you think that in that instance you would</p> <p>25 be able to ask the federal court to assert</p>	<p style="text-align: right;">Page 85</p> <p>1 BellSouth and KMC executed these</p> <p>2 agreements, the body of law that was</p> <p>3 effective as of that date would apply,</p> <p>4 except as where we explicitly agreed to</p> <p>5 something different in the agreement as of</p> <p>6 May 1st. If June 30th, 2005, the body of</p> <p>7 law in any regard in the state or federal</p> <p>8 level changed, that would not</p> <p>9 automatically be included in that contract</p> <p>10 executed on May 1st, 2005. It would be</p> <p>11 subject to the change in law provisions,</p> <p>12 negotiation, and possibly arbitration.</p> <p>13 Q. Do you have a running list of instances</p> <p>14 where the parties decided to agree to</p> <p>15 something that is different than what the</p> <p>16 law requires?</p> <p>17 A. I do not. In fact, we have agreed and --</p> <p>18 in a number of instances to agree to</p> <p>19 specifically conform to applicable law as</p> <p>20 well as to integrate language from the</p> <p>21 Rules and the Act.</p> <p>22 Q. Are there instances where the parties</p> <p>23 disagreed or the parties agreed to comply</p> <p>24 with something that's not required by the</p> <p>25 law?</p>

22 (Pages 82 to 85)

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1 A. Yes.
2 Q. Are you aware of any?
3 A. For example, in KMC's interconnection
4 section attachment 3, KMC believes that
5 the law provides for a single point of
6 interconnection within a LATA. KMC and
7 BellSouth explicitly agree to additional
8 points of interconnection based on usage
9 measurement criteria outside of what KMC
10 believes the law provides.
11 Q. And are you aware of all instances in
12 which the parties have agreed to something
13 other than what the law requires?
14 A. Not offhand.
15 Q. How long have the parties been negotiating
16 this agreement?
17 A. Wow, since October 2003.
18 Q. And would you agree with me that -- the
19 agreement as it existed --
20 A. July 2003? I'm sorry.
21 Q. July 2003. Would you agree with me that
22 the agreement encompasses roughly 500
23 pages?
24 A. I would agree.
25 Q. And it contains the parties'

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1 interpretation of various FCC rules and
2 decisions?
3 A. I would agree.
4 Q. In the instance where the parties have
5 agreed to its understanding of what an FCC
6 rule means, is it KMC's intention to use
7 its understanding that the agreement
8 incorporates all applicable law to
9 circumvent what the parties agreed to
10 specifically in the contract?
11 A. Not at all.
12 Q. Okay.
13 A. I believe that that is part of what makes
14 this process so extensive, that it is part
15 of why the document in the end is going to
16 be over 500 pages, because we do make
17 effort to be explicit.
18 Q. Is there a potential, based upon your
19 understanding, that the agreement should
20 encompass all applicable law at the time
21 of contracting, that there could be a
22 situation where one party during
23 negotiation agrees to how the parties will
24 interpret a specific provision but down
25 the road determines that they don't want

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1 to comply with that anymore and will rely
2 on a different interpretation based upon
3 the same law that we tried -- to avoid the
4 obligation that they agreed to?
5 That's a long one, huh?
6 A. It is.
7 Q. All right. Let me try again. Do you
8 think there is a potential that one party
9 could argue via your understanding that
10 the agreement encompasses all applicable
11 law to obviate or circumvent specific
12 provisions that were agreed to in the
13 negotiations process?
14 For instance, let's say -- let's
15 say that you and I agree that the FCC rule
16 said blank means this, and we did that two
17 years ago when we first started this
18 negotiation. Two years down the road, you
19 realize that what we agreed to is not
20 really what you wanted.
21 Is it your intention to use this
22 understanding of Georgia law to try to
23 avoid the express language that the
24 parties agreed to regarding its
25 interpretation of the law?

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1 A. Not at all. In fact, that is, again, one
2 of the benefits to our efforts to be
3 diligent in describing what we believe the
4 obligations are in the body of the
5 contract.
6 Q. I'd like for you to look at section 32.2
7 of Exhibit 13. And let me know when
8 you've had a chance to review it.
9 (PAUSE.)
10 Q. And specifically, I'm referring to
11 BellSouth's language.
12 (PAUSE.)
13 A. Okay.
14 Q. Does KMC have an objection to BellSouth's
15 proposed language regarding how the
16 parties should address situations where
17 one party asserts the -- you know, where
18 there is a dispute over what the law is
19 regarding a particular provision?
20 A. Basic objection is that the agreement
21 already contains dispute resolution
22 provisions. And in many instances when
23 issues arise, that is the best mechanism.
24 In most instances, it's the best mechanism
25 to move forward and seek resolution of the

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<p>1 dispute.</p> <p>2 KMC's position is that the</p> <p>3 language proposed by BellSouth is that it</p> <p>4 creates an alternative -- an additional</p> <p>5 dispute resolution specific to these</p> <p>6 issues when there's already a dispute</p> <p>7 resolution process set forth in the</p> <p>8 agreement.</p> <p>9 Q. Okay. Well, let's take the situation</p> <p>10 where KMC says, BellSouth, your obligation</p> <p>11 under FCC rules is this, okay. And that</p> <p>12 provision is not expressly addressed in</p> <p>13 the agreement. Is it your interpretation</p> <p>14 of this contract -- and of your provided</p> <p>15 language for 32.2 that BellSouth would be</p> <p>16 obligated to comply with this FCC rule?</p> <p>17 A. That would certainly be our</p> <p>18 interpretation, but our interpretation</p> <p>19 would be subject to your disagreement and</p> <p>20 to your dispute and to the dispute</p> <p>21 resolution provisions set forth herein.</p> <p>22 Q. Do you consider state unbundling laws to</p> <p>23 be applicable law?</p> <p>24 A. I do.</p> <p>25 Q. Is it your interpretation of section 32.2</p>	<p>1 Q. Do you think that you could hold BellSouth</p> <p>2 to be in breach of those laws in this</p> <p>3 agreement if BellSouth doesn't comply with</p> <p>4 them?</p> <p>5 A. To the extent that there was an obligation</p> <p>6 under the state unbundling laws that we</p> <p>7 did not explicitly contract otherwise to</p> <p>8 operate differently for, yes.</p> <p>9 Q. Presume with me that the FCC says, no more</p> <p>10 mass market unbundled switching in its</p> <p>11 final rules, okay. And that North</p> <p>12 Carolina rules -- I don't know what they</p> <p>13 are, but let's say that they say you do</p> <p>14 have to provide switching on an unbundled</p> <p>15 basis. Do you believe that BellSouth has</p> <p>16 an obligation -- and -- the state rule</p> <p>17 is not memorialized in the contract.</p> <p>18 Do you believe BellSouth has an</p> <p>19 obligation to provide mass market</p> <p>20 switching on an unbundled basis under</p> <p>21 state law?</p> <p>22 A. I believe that, under the contract, at</p> <p>23 that point in time, there was an</p> <p>24 obligation to provide mass market</p> <p>25 switching in the contract. BellSouth</p>
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<p>1 that state's unbundling laws are</p> <p>2 incorporated into this agreement?</p> <p>3 A. I do.</p> <p>4 Q. Why is that?</p> <p>5 A. State unbundling laws would be implemented</p> <p>6 via rules, though I'm not aware of any</p> <p>7 rules implementing any specific state's</p> <p>8 unbundling laws.</p> <p>9 Q. So there would need to be state rules</p> <p>10 interpreting the state unbundling rules</p> <p>11 before they could be incorporated into the</p> <p>12 agreement?</p> <p>13 A. Though I believe that state unbundling</p> <p>14 laws exist, without actually presenting me</p> <p>15 with one, it's hard to integrate it into</p> <p>16 the terms of the agreement. It's hard</p> <p>17 to...</p> <p>18 (PAUSE.)</p> <p>19 Q. Do you believe that there are state</p> <p>20 unbundling laws in North Carolina?</p> <p>21 A. Yes.</p> <p>22 Q. Do you believe those laws via section 32.2</p> <p>23 of the general terms and conditions are</p> <p>24 incorporated into this agreement?</p> <p>25 A. Yes.</p>	<p>1 would have an obligation as expressly</p> <p>2 provided in the contract, and we would</p> <p>3 negotiate implementation and specific</p> <p>4 integration of the final rules and North</p> <p>5 Carolina law in order to address variances</p> <p>6 at that point in time when that decision</p> <p>7 was rendered.</p> <p>8 Q. Okay. Well, today -- let's say North</p> <p>9 Carolina law hasn't changed, it's in</p> <p>10 existence today. And let's say that we</p> <p>11 sign a contract prior to implementation of</p> <p>12 the FCC's final rules and the contract</p> <p>13 does not address application of state law,</p> <p>14 state unbundling laws.</p> <p>15 Is it your opinion that those laws</p> <p>16 are incorporated into this agreement?</p> <p>17 A. Your question is difficult, because what</p> <p>18 you're asking is in the absence of the</p> <p>19 unbundling obligation on the FCC, would</p> <p>20 the state law apply, but in the context of</p> <p>21 the contracts that we're analyzing at</p> <p>22 issuance, neither the FCC obligation or</p> <p>23 lack thereof nor the state obligation have</p> <p>24 been an agreement to the contract.</p> <p>25 Q. Right. And so --</p>

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1 A. So --
2 Q. Oh, I'm sorry. I didn't mean to
3 interrupt.
4 A. That's why I'm saying it's hard because,
5 first, the contract must be amended to
6 reflect the absence of the federal
7 requirement. So it's difficult to answer
8 that question in the context you've posed
9 it.
10 Q. You would agree with me that the contract
11 to date does not address state unbundling
12 laws?
13 A. It does not explicitly address.
14 Q. Explicitly address. And under your theory
15 of the fact that the agreement should
16 encompass all applicable law in existence,
17 that through that theory, state unbundling
18 laws could be included in this agreement?
19 A. Correct. But it becomes a chicken/egg
20 theory again, because the specific
21 unbundling obligations are set forth in
22 the agreement and there's no conflict at
23 this point in terms of how we've defined
24 the unbundling obligations. We'd have to
25 envision a scenario where the FCC ruled

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1 and then the state ruled and we'd have to
2 integrate the contract. So I can't think
3 of a scenario where we wouldn't explicitly
4 integrate them, but...
5 Q. Do you believe that parties, especially
6 after spending two-and-a-half years
7 negotiating, should feel comfortable to
8 exactly what they're contracting for?
9 A. I don't -- wouldn't use the word exactly,
10 but I would say that the parties should be
11 confident that they're clear as to the
12 scope of the obligations in the agreement.
13 MR. MEZA: Let's go off the
14 record.
15 (DISCUSSION OFF THE RECORD.)
16 Q. Ms. Johnson, presume for me that there are
17 certain services that you are purchasing
18 today for BellSouth that are being
19 provided on an unbundled basis.
20 A. Uh-huh.
21 Q. That as a result of an FCC decision,
22 BellSouth no longer has an obligation to
23 provide those services on an unbundled
24 basis. And that as a matter of law, you
25 have to transition those services to

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1 another service platform or disconnect it.
2 A. Okay.
3 Q. In that instance, is it your position that
4 BellSouth should be responsible for
5 identifying the circuits or services that
6 need to be transitioned so that the
7 parties are complaint with the law?
8 MR. CAMPEN: Objection to the form
9 of the question.
10 A. It's a shared responsibility. I believe
11 that the logical and most reasonable
12 approach on a business perspective is for
13 BellSouth to identify those circuits it
14 believes are impacted, to provide that
15 information to the CLEC in order for the
16 competitive provider to affirm those
17 circuits that it believes are impacted, or
18 -- to raise dispute or disagreement.
19 issues the parties should work together to
20 resolve any discrepancies in whatever they
21 believe is the full impacted circuit
22 inventory and then should work together to
23 establish the migration process. I
24 believe that BellSouth owns the system,
25 so -- business processes, so logically

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1 BellSouth would process those orders for
2 transition.
3 Q. Now, you -- is it your testimony that KMC
4 will have its own list of services and
5 circuits that it believes need to be
6 transitioned?
7 A. It's my testimony that BellSouth would
8 provide a list and that the parties would
9 share that list then to make that list a
10 working list they work together on.
11 Q. So you'll take the BellSouth list and then
12 do what with it?
13 A. We will affirm circuits that we agree are
14 subject to transition and impacted by the
15 transition rules or whatever the mechanism
16 is for converting from UNE to special
17 access. And then we will raise disputes
18 for those that we don't believe or agree
19 with BellSouth that impact, and then we
20 would work together to resolve those
21 issues and to complete the list.
22 Then BellSouth, as the OSS owner,
23 the business process owner, could move
24 forward with managing those business
25 transitions.

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<p>1 Q. Does KMC know the particular circuits and 2 services that it buys from BellSouth? 3 A. You would be surprised, but we do, because 4 of the LECs billing process. We use 5 BellSouth's records to confirm and 6 validate our inventory. 7 Q. Would KMC be in an equal position to 8 identify the circuits that it believes it 9 needs to transition? 10 A. I don't think that we would be in an equal 11 position. And the reason that I don't 12 believe that we would be in an equal 13 position is because the data that we 14 receive, we rely on BellSouth's invoices 15 to confirm and validate the services that 16 BellSouth provides to us. 17 In addition, there are maybe 18 certain limitations, certain qualifiers on 19 the types of services that are going to be 20 subject to such proposed or theoretical 21 transition, and we believe that BellSouth 22 has information that is superior to the 23 information that KMC has in identifying 24 those circuits. 25 Let's just say, as an example, if</p>	<p>1 transitioned? 2 A. It's a theoretical question, but it's my 3 belief that would be right. 4 Q. Yeah. I mean, your intention is to comply 5 with the law? 6 A. Our intention is to comply with the law. 7 Q. And it's not to take advantage of an error 8 that BellSouth may have and -- If it is 9 the party responsible for identifying the 10 circuits initially? 11 A. Indeed. 12 Q. Now -- 13 A. It's a shared responsibility. We would 14 need you to identify the ones you believe 15 are impacted. We'd work together. 16 Q. And if you found some additional ones that 17 BellSouth did not find, what would you do? 18 A. We'd identify them. 19 Q. Is it your opinion that BellSouth should 20 transition these services for free? 21 A. When you say "free", I don't know that it 22 would be for free, because I'm not very 23 familiar with whether or not BellSouth's 24 cost studies and BellSouth's rates and 25 terms and conditions and TELRIC business</p>
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<p>1 the final rules included a requirement 2 that -- finding that there's no 3 unbundling obligation and serving wire 4 centers that work greater than 60,000 5 lines, and four fiber-based collocators 6 were located -- at that collocation, KMC 7 has no knowledge as to how many 8 collocators are within BellSouth's central 9 office or as to whether or not they're 10 fiber based. 11 In fact, the data that was filed 12 in the Triennial Review was, so KMC could 13 not identify in that instance any loops or 14 transport facilities that would be subject 15 to it being impacted by the final rules. 16 And we would rely on BellSouth as the 17 holder of that information to help us 18 start that process by identifying the 19 initial circuits and we'd work together to 20 validate that list. 21 Q. If BellSouth does do that and KMC 22 identifies circuits or services that 23 BellSouth failed to identify in its list, 24 would KMC add those newly found circuits 25 and services to the list to be</p>	<p>1 models contemplate service movements or 2 how that's accounted for under TELRIC 3 pricing principles. So I don't know that 4 I'd say that that transition is free. 5 Q. Okay. Do you know if in the TELRIC world 6 when you disconnect a circuit if a 7 disconnect charge based upon TELRIC 8 principles is charged? 9 A. When KMC elects to disconnect a service 10 and BellSouth performs, at KMC's election, 11 a service disconnect, there is a charge. 12 Q. All right. Let's say KMC chooses not to 13 disconnect, not to transition a service, 14 but to disconnect a service that needs to 15 be -- that is no longer available on an 16 unbundled basis. 17 Would KMC be willing to pay the 18 TELRIC disconnect charge in that instance? 19 A. KMC is going to focus on understanding the 20 final rules as it relates to that issue. 21 BellSouth is the cost causer in that 22 instance as opposed to the instance where 23 KMC elects to disconnect service. In the 24 instance that you propose in that example, 25 KMC is not the cost causer, that is a</p>

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1 change in law that allows BellSouth to
2 avail itself of a right BellSouth has.
3 BellSouth could continue to offer the
4 services at UNE-P rates or rates that look
5 like UNE, although there is no
6 obligation.
7 If -- It is BellSouth's decision
8 not to provide services that it didn't
9 have to provide under the law and it's
10 BellSouth's selection in that instance to
11 no longer provide KMC with these UNE
12 services. So KMC, in that instance, is
13 not electing to discontinue service.
14 BellSouth has discontinued that delivery
15 or provision of that service to KMC.
16 Q. So the answer to my question would be no?
17 A. The answer to your question is no.
18 Q. Is there any instance where KMC is
19 transitioning something, a service to
20 either a tariff service, resale basis or
21 disconnecting it that it believes it
22 should pay nonrecurring charges that are
23 associated with that transition or
24 termination?
25 A. In instances where it's KMC's election to

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1 do so, as we do today when we do UNE
2 conversions, when we converted special
3 access to UNEs, we pay, at our election,
4 to convert those services, a conversion
5 fee.
6 Again, if I discontinued a service
7 to my customer, I would not charge my
8 customer a discontinued fee because I
9 elected to no longer provide that service
10 to my customer. And I see it similarly
11 here.
12 So in -- you know, in the
13 examples you propose, it's my
14 understanding it's BellSouth's decision to
15 discontinue the services that KMC was
16 receiving that causes KMC to have to
17 disconnect that service.
18 Q. All right. Well, let's take your retail
19 analogy. You tell your customers that the
20 product that you are currently receiving
21 is no longer going to be available after a
22 date certain. And you -- And they have
23 to either elect to go to another service
24 platform or service offering or
25 discontinue receiving the service. And

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1 associated with the new product offering
2 is a charge associated with setting up
3 that new account. Would you waive that
4 charge for your customer?
5 A. We do waive install fees for customers.
6 Remember, also, the difference between
7 KMC's customers and BellSouth's customers
8 is that my customer truly does have a
9 choice to receive service from KMC or to
10 receive service from at least one other
11 service provider, the incumbent. Where in
12 the instant case, in the case of
13 discontinued services based on the
14 Triennial Review, USTA II, and the final
15 rules, KMC, regardless as to whether or
16 not the impairment standard recognizes it,
17 has no alternative service provider.
18 BellSouth is the only provider in many
19 instances for the services that KMC wishes
20 to use.
21 Q. Well, let's clear something up. The
22 service is still being offered. It's just
23 at a higher price.
24 A. So then why do I need to disconnect the
25 circuit at all? Just change the billing

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1 on it. Record change charge.
2 Q. But you have the choice of whether to
3 continue to receive the service at higher
4 prices, don't you?
5 A. BellSouth's discontinued the service;
6 correct?
7 Q. Well, BellSouth's no longer offering,
8 pursuant to law, a service at a
9 particular -- a UNE service at a
10 particular price.
11 A. What you're actually going to offer in
12 exchange for the UNE service that I had is
13 a special access service which BellSouth
14 says, while comparable to the UNE service,
15 is better, so --
16 Q. It is?
17 A. It should not be the same service if --
18 Q. Much better.
19 A. So, hopefully, it's not the same service.
20 You did discontinue the service I was.
21 Q. So you're construing -- well, the
22 fundamental telecom service, in your
23 opinion, does it change between UNE and
24 special access?
25 A. The fundamental telecom service?

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1 MR. CAMPEN: Objection to the
2 form. I don't know what fundamental --
3 Q. Of the underlying telecom service.
4 A. No.
5 Q. Do you know if you're getting extra stuff
6 with special access?
7 A. Though I'm not an engineer, my
8 understanding is that special access
9 services include things that we
10 traditionally provide in the context of a
11 UNE loop.
12 Q. As part of your proposal, I believe it's
13 that you state that if you get notice from
14 BellSouth and you don't submit an order to
15 rearrange or disconnect a circuit within
16 31 days of the notice, BellSouth can
17 disconnect it; is that right?
18 A. Could you please point to the testimony?
19 Q. Yeah. That is one -- excuse me, after
20 attachment 2, section 1.11.1. It's on
21 page -- should be on page 7.
22 A. Okay.
23 Q. Do you see that?
24 A. I do.
25 Q. Do you agree with my characterization of

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1 what your proposal is?
2 A. I actually -- though I'm not sure
3 procedurally how we do this, I believe
4 this particular language will be
5 implicated in the final rules, and I just
6 don't know that our position would --
7 Q. Change?
8 A. -- would be the same going forward.
9 Q. Fair enough. I mean, we don't know what
10 the final rules say.
11 A. I know that they provide for some
12 transition period that would be different
13 than the 30 days that we've set forth
14 here, at least in the press release they
15 did.
16 Q. Are you suggesting that the language that
17 you proposed is subject to being withdrawn
18 based upon what the final rules say?
19 A. That's KMC's position. I've not had an
20 opportunity to confer with counsel or any
21 of the other Joint Petitioners. It would
22 be to the final rules.
23 Q. Well, can I ask you a question based on as
24 it exists today understanding your
25 position?

Page 108

1 A. That's fine.
2 Q. Okay. If KMC doesn't inform BellSouth of
3 this dispute within 31 days of the receipt
4 of the notice, are you releasing BellSouth
5 for any claims, causes of action, or any
6 other damages that may result from the
7 disconnection of the service?
8 A. It appears that KMC is explicitly granting
9 BellSouth the right to disconnect the
10 service without further notice as long as
11 we have not provided notice of any dispute
12 with regard to that service being
13 transitioned.
14 Q. And does that express right to disconnect
15 equate to a waiver of any claim you may
16 have for the disconnection?
17 A. What it equates to -- and I don't want to
18 mince words --
19 Q. Sure.
20 A. -- is BellSouth availing itself of a
21 right, therefore, not triggering any
22 penalties, defaults, indemnification, or
23 other liability because BellSouth acts
24 within the rights it had in the contract.
25 Again, assuming we did not dispute it.

Page 109

1 Q. Does KMC buy multiplexing from BellSouth?
2 A. KMC buys loops or transport, which is
3 multiplexing.
4 Q. Okay. Bad answer. Because now I've got
5 to ask you a question and show you a
6 picture. All right. I'm showing you
7 Exhibit 16, and I'd like to walk through
8 it with you.
9 Do you see exactly what
10 multiplexing you're talking about?
11 A. Okay. This part of your walk through, are
12 you going to include an explanation of
13 some of the items?
14 Q. Sure. See the house?
15 A. Looks just like my house.
16 Q. That's right. Presume with me that,
17 starting on the right-hand side, that is a
18 voice frequency analog loop coming out of
19 the NID; okay? It goes into a DLC remote
20 terminal through a line card. It's mux-ed
21 up at the DLC into a DS-1 going into
22 BellSouth's central office, okay. Each
23 one of those line cards has, I think, four
24 ports, so they all equal into a DS-1
25 coming out. Once it hits BellSouth's

<p style="text-align: right;">Page 110</p> <p>1 central office, it goes to the DLC and 2 goes through the main distribution frame 3 where it's demux-ed back down to a voice 4 frequency loop, single line analog loop. 5 And then it's attached by a connecting 6 facility assignment on the main 7 distribution frame to your CLEC 8 collocation space where it's mux-ed up on 9 a DS-1 or DS-3 going out, wherever you 10 want it to go. 11 A. Okay. 12 Q. All right. Is there any part that you 13 need any further clarification on? 14 A. Yes. 15 Q. Okay. 16 A. This multiplexer exists in my collocation 17 space, so my presumption by this 18 representation is that the intent this is 19 indicated back to the KMC owns this 20 multiplexing system and KMC is providing 21 the multiplexing. 22 Q. No, that's not what it's intended to do. 23 It is multiplexing provided by -- that 24 you're purchasing from BellSouth. 25 A. Okay. But that's in my collocation space?</p>	<p style="text-align: right;">Page 112</p> <p>1 A. Is this transport or cross connect? 2 Q. It's a CFA. There's a connecting facility 3 assignment here. It's similar to a cross 4 connect. 5 A. So it's a cross connect? 6 Q. Yes. 7 A. See, it's my understanding that the loop, 8 the cross connect is the -- and I'm not 9 an engineer by any stretch of anyone's 10 imagination. 11 Q. Sure. 12 A. I envision the main distribution frame as 13 a patch panel. I would envision the CFA 14 or cross connects as literally what's 15 physically connecting that facility to the 16 next piece of equipment it needs to get to 17 get into my collocation. 18 Q. So you would consider that to be part of 19 the loop? 20 A. I would consider it to be part of the 21 loop. 22 Q. Do you know if there's a definition that 23 the FCC said a loop as going from the NID 24 to the main distribution point? 25 A. Or to ask a different question, is the NID</p>
<p style="text-align: right;">Page 111</p> <p>1 Q. Yes. Well, I don't know if it's in the 2 collocation space, but it's on the way to 3 your collocation space. 4 A. Okay. 5 Q. It's aggregating all -- you're asking 6 BellSouth, aggregate all of my analog 7 loops that I buy from you such that I can 8 send them out on a high cap loop going out 9 of my collocation space. Is that 10 something you buy from BellSouth? 11 A. KMC uses a lot of its own transport, so I 12 don't -- in some instances we would buy 13 some transport from BellSouth and ask you 14 to aggregate and mux it up, so, yes, we 15 might buy that from BellSouth. 16 Q. Now, the multiplexing that's occurring in 17 the outside plant facility in the DLC, do 18 you know if BellSouth charges you for 19 that? 20 A. This multiplexing is a part of the loop, 21 correct? 22 Q. That's right. Do you consider the 23 multiplexing that's occurring after the 24 main distribution frame to be part of the 25 loop?</p>	<p style="text-align: right;">Page 113</p> <p>1 integrated in the main distribution frame? 2 Q. The NID would be at the customer's 3 premises. 4 A. Oh, the NID -- I'm thinking of the CFA. 5 Q. Yeah. 6 A. I'm sorry. You're speaking way back here. 7 Q. Yeah. 8 A. And I believe that the FCC's 9 definition -- let me see -- looking for 10 the order -- Triennial Review Order. The 11 FCC said, at it's most basic level, a 12 local loop that serves the mass market 13 consists of transmission medium, which 14 almost always includes copper wires of 15 various gauges. The loop may include 16 additional components; for example, load 17 coils, bridge taps, repeaters, 18 multiplexing equipment, that are usually 19 intended to facilitate the provision of 20 narrowband voice service. And I'm reading 21 from paragraph 214 of the Triennial 22 Review. 23 Q. So your answer would be -- is what? 24 A. My answer would be that the loop does 25 include multiplexing. But the question</p>

<p style="text-align: right;">Page 114</p> <p>1 was whether or not it included the NID?</p> <p>2 Q. No. I'm asking you if you -- is it your</p> <p>3 understanding that the FCC has defined a</p> <p>4 loop from -- going the main distribution</p> <p>5 frame to the NID or the customer premises?</p> <p>6 A. The FCC has defined the loop as the</p> <p>7 element -- is defined as a transmission</p> <p>8 facility between the main distribution</p> <p>9 frame or its equivalent and an incumbent</p> <p>10 LECs' central office and the loop</p> <p>11 demarcation point at an end-user customer</p> <p>12 premise, and the NID would be the loop</p> <p>13 demarcation point.</p> <p>14 Q. Right. So do you read that to mean it's</p> <p>15 from the NID to the main distribution</p> <p>16 frame?</p> <p>17 A. The main distribution frame or its</p> <p>18 equivalence.</p> <p>19 Q. And what do you constitute its equivalent?</p> <p>20 A. Not -- And I'm not an engineer.</p> <p>21 Q. Yeah.</p> <p>22 A. So, again, I consider the cross connect in</p> <p>23 this instance, because it's being cross</p> <p>24 connected to reach my collocation, to be</p> <p>25 an equivalent to the main distribution</p>	<p style="text-align: right;">Page 116</p> <p>1 part of the main distribution frame.</p> <p>2 Q. Do you know what the main distribution</p> <p>3 frame does?</p> <p>4 A. Again, Robert Collins could better address</p> <p>5 these questions, to my understanding.</p> <p>6 Q. Is he assigned 27? If he is, I'm sorry.</p> <p>7 A. No, no, no, no. But the specific question</p> <p>8 you're asking about the main distribution</p> <p>9 frame.</p> <p>10 Q. Okay.</p> <p>11 A. The main distribution frame, it's my</p> <p>12 understanding, is that it's -- literally</p> <p>13 is kind of the traffic cop to direct</p> <p>14 circuits to their termination point.</p> <p>15 Q. Well, how would a CFA be equivalent to a</p> <p>16 main distribution frame based upon your</p> <p>17 understanding?</p> <p>18 A. I believe that the CFA is integrated</p> <p>19 conceptually into the main distribution</p> <p>20 frame because the CFA is what tells the</p> <p>21 main -- that is the main -- that is what</p> <p>22 tells the main distribution frame, this is</p> <p>23 where this facility -- it's almost -- in</p> <p>24 my mind, is it's the address within the</p> <p>25 main distribution frame to provide a</p>
<p style="text-align: right;">Page 115</p> <p>1 frame, that this is one arrangement.</p> <p>2 Q. Do you know what -- if you pay TELRIC for</p> <p>3 that CFA?</p> <p>4 A. This is a UNE loop?</p> <p>5 Q. Up to the main distribution frame.</p> <p>6 A. And this is my facility's -- this digital</p> <p>7 transmission facility to CLEC's central</p> <p>8 office? Whose facility is that?</p> <p>9 Q. You are taking it out of your collocation</p> <p>10 space to your own -- wherever you want to</p> <p>11 take it.</p> <p>12 A. On my transport?</p> <p>13 Q. On your transport.</p> <p>14 A. Then it should be a UNE rate.</p> <p>15 Q. Okay. Under your theory, would the --</p> <p>16 where would the loop end?</p> <p>17 A. The loop would end at my collocation space</p> <p>18 or the CFA assignment where you deliver it</p> <p>19 to me, which is -- again, I believe, CFA</p> <p>20 is within that main distribution frame.</p> <p>21 Q. Do you believe that a CLEC collocation</p> <p>22 space is equivalent to a main distribution</p> <p>23 frame?</p> <p>24 A. I believe that the CFA, which essentially</p> <p>25 is what's required to get it to me, is a</p>	<p style="text-align: right;">Page 117</p> <p>1 relationship in the direction for that</p> <p>2 circuit -- circuit facility assignment.</p> <p>3 So is this -- if I envision the</p> <p>4 main distribution frame like your</p> <p>5 traditional mall room, where you've got a</p> <p>6 wall of slots and each of them was</p> <p>7 numbered, the CFA would be the number</p> <p>8 within the slot that says when you get a</p> <p>9 loop from this location, put it in number</p> <p>10 15. Boom. And number 15 on the other</p> <p>11 side comes out to my switch.</p> <p>12 Q. Would you agree that the loop has to,</p> <p>13 before it even hits the CFA, has to end at</p> <p>14 the MDL and then somehow it -- the</p> <p>15 frequency or whatever it's traveling on,</p> <p>16 that loop somehow is transitioned to the</p> <p>17 CFA on the backside of the MDF?</p> <p>18 A. So are you asking whether conceptually the</p> <p>19 CFA is on the backside in the main</p> <p>20 distribution frame?</p> <p>21 Q. Yeah. I mean, what I'd like for you to</p> <p>22 envision, the MDF, you know, main</p> <p>23 distribution frame at BellSouth's central</p> <p>24 office, loop comes in, you own that loop,</p> <p>25 okay. And then you have decided to route</p>

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1 that loop or the voice data -- and data
2 that's traveling on that loop through
3 your -- to your own facility. And you
4 are going to aggregate all of your
5 facilities into a high cap loop, for
6 whatever reason, when it exits your
7 collocation space.
8 And I'm asking if you know if when
9 you attach a CFA to the main distribution
10 frame to hand off the traffic that's on
11 the loop as it enters the main
12 distribution frame, if that is a seamless
13 or does it constitute the same loop?
14 A. It's seamless in my mind.
15 Q. Do you know technically whether there is
16 an actual -- I want to say plug in, plug
17 out or plug in, plug in?
18 A. I don't know technically whether there's
19 two physical, one plug in, one plug out.
20 MR. MEZA: Okay. I think we're
21 done for today.
22 (THE DEPOSITION CONCLUDED AT 5:23 P.M.)
23
24
25

Page 120

1 SIGNATURE
2 I, Marva Johnson, do hereby state under
3 oath that I have read the above and
4 foregoing deposition in its entirety and
5 that the same is a full, true and correct
6 transcript of my testimony.
7 Signature is subject to corrections on
8 attached errata sheet, if any.
9
10 Marva Johnson
11
12 State of
13
14 County of
15
16 Sworn to and subscribed before me this
17 day of , 20 .
18
19 Notary Public
20
21 My commission expires:
22
23
24
25

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1 ERRATA SHEET
2
3 Case name: In the Matter of
4
5 Joint Petition NewSouth
6 Communications for
7 Arbitration with BellSouth
8
9 Deponent: Marva Johnson, Volume I
10
11 Date:
12
13 PAGE LINE READS SHOULD READ
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1 CERTIFICATE
2 State of North Carolina
3 County of Harnett
4
5 I, Nicole Ball Fleming, a notary public in
6 and for the State of North Carolina, do
7 hereby certify that there came before me
8 on the 17th day of December, 2004, the
9 person hereinbefore named, who was by me
10 duly sworn to testify to the truth and
11 nothing but the truth of his knowledge
12 concerning the matters in controversy in
13 this cause; that the witness was thereupon
14 examined under oath, the examination
15 reduced to typewriting by myself; and the
16 deposition is a true and accurate
17 transcription of the testimony given by
18 the witness.
19 I further certify that I am not counsel
20 for, nor in the employment of any of the
21 parties to this action, that I am not
22 related by blood or marriage to any of the
23 parties, nor am I interested, either
24 directly or indirectly, in the results of
25 this action.
In witness whereof, I have hereto set my
hand and affixed my official notarial
seal, this 2nd day of January, 2005.

Nicole Ball Fleming
Notary Public
My commission expires 4/30/05

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-772, Sub 8
Docket No. P-913, Sub 5
Docket No. P-989, Sub 3
Docket No. P-824, Sub 6
Docket No. P-1202, Sub 4

COPY

In the Matter of)
)
Joint Petition NewSouth)
Communications Corp., et al. for)
Arbitration with BellSouth)
Telecommunications, Inc.)

Raleigh, North Carolina
Friday, December 17, 2004
Deposition of MARVA JOHNSON,
VOLUME II

a witness herein, called for
examination by counsel for BellSouth, in
the above-entitled action, pursuant to
Notice, the witness being duly sworn by
Nicole Ball Fleming, Court Reporter and
Notary Public in and for the State of
North Carolina, taken at the offices of
Parker Poe Adams & Bernstein, 150
Fayetteville Street Mall, Suite 1400,
Raleigh, North Carolina, beginning at 9:05
a.m., on Friday, December 17, 2004, such
proceedings being taken stenographically
by Nicole Ball Fleming.

APPEARANCES OF COUNSEL		Page 123
1		
2		
3	On behalf of the Joint Petitioners.	
4	Henry C. Campen, Jr	
5	Parker, Poe, Adams & Bernstein	
6	150 Fayetteville Street Mall	
7	Suite 1400	
8	Raleigh, NC 27601	
9		
10	Garret R. Hargrave	
11	Kelley Drye & Warren	
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13	Suite 500	
14	Washington, DC 20036	
15		
16	On behalf of BellSouth	
17	Jim Meza	
18	Robert Culpepper	
19	BellSouth Legal Department	
20	675 West Peachtree Street, NE	
21	Suite 4300	
22	Atlanta, GA 30375	
23		
24		
25		

STIPULATIONS		Page 125
1		
2	Prior to examination of the witness,	
3	counsel for the parties stipulated and	
4	agreed as follows:	
5	1. Said deposition shall be taken for	
6	the purpose of discovery or for use as	
7	evidence in the above-entitled action or	
8	for both purposes, as permitted by the	
9	applicable rules of civil procedure;	
10	2. Any objections of any party hereto as	
11	to Notice of the taking of said deposition	
12	or as to the time and place thereof or as	
13	to the competency of the person before	
14	whom the same shall be taken are hereby	
15	waived,	
16	3. Objection to questions and motions to	
17	strike answers need not be made during the	
18	taking of this deposition, but may be made	
19	for the first time during the progress of	
20	the trial of this case, or at any pretrial	
21	hearing held before the Judge for the	
22	purpose of ruling thereon or at any other	
23	hearing of said case at which said	
24	deposition might be used, except that an	
25	objection as to the form of a question	
	must be made at the time such question is	
	asked or objection is waived as to the	
	form of the question,	
	4. That all formalities and requirements	
	of the Statute with respect to any	
	formalities not herein expressly waived	
	are hereby waived, especially including	
	the right to move for the rejection of	
	this deposition before trial for any	
	irregularities in the taking of the same,	
	either in whole or in part or for any	
	other cause,	
	5. That the sealed original transcript	
	of this deposition shall be mailed	
	first-class postage or hand-delivered to	
	the party taking the deposition or its	
	attorney for preservation and delivery to	
	the Court, if and when necessary	

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MARVA JOHNSON,		Page 126
1		
2	having been duly sworn,	
3	testified as follows:	
4	CONTINUED DIRECT EXAMINATION	
5	BY MR. MEZA:	
6	Q. Good morning, Ms. Johnson.	
7	A. Good morning, Mr. Meza.	
8	Q. Do you believe that BellSouth has an	
9	obligation to commingle UNEs with any	
10	service or offering that it's required to	
11	provide pursuant to 271?	
12	A. I do. In fact, I believe BellSouth's	
13	obligation is broader than that.	
14	BellSouth's obligation is to commingle	
15	UNEs with any of BellSouth's wholesale	
16	services.	
17	Q. What other types of wholesale services --	
18	or what types of wholesale services are	
19	you referring to?	
20	A. Resell services, 271 services, special	
21	access services, any other wholesale	
22	service that BellSouth provides is subject	
23	to commingling with 251 UNE.	
24	Q. What is your understanding of what	
25	commingling means?	

<p>1 APPEARANCES OF COUNSEL 2 3 On behalf of the Joint Petitioners 4 5 Henry C. Campen, Jr. 6 Parker, Poe, Adams & Bernstein 7 150 Fayetteville Street Mall 8 Suite 1400 9 Raleigh, NC 27601 10 11 Garret R. Hargrave 12 Kelley Drye & Warren 13 1200 19th Street, NW 14 Suite 500 15 Washington, DC 20036 16 17 On behalf of BellSouth: 18 19 Jim Meza 20 Robert Culpepper 21 BellSouth Legal Department 22 675 West Peachtree Street, NE 23 Suite 4300 24 Atlanta, GA 30375 25</p>	<p>Page 2</p> <p>1 STIPULATIONS 2 Prior to examination of the witness, 3 counsel for the parties stipulated and 4 agreed as follows: 5 1. Said deposition shall be taken for 6 the purpose of discovery or for use as 7 evidence in the above-entitled action or 8 for both purposes, as permitted by the 9 applicable rules of civil procedure. 10 2. Any objections of any party hereto as 11 to Notice of the taking of said deposition 12 or as to the time and place thereof or as 13 to the competency of the person before 14 whom the same shall be taken are hereby 15 waived. 16 17 3. Objection to questions and motions to 18 strike answers need not be made during the 19 taking of this deposition but may be made 20 for the first time during the progress of 21 the trial of this case, or at any pretrial 22 hearing held before the Judge for the 23 purpose of ruling thereon or at any other 24 hearing of said case at which said 25 deposition might be used, except that an objection as to the form of a question must be made at the time such question is asked or objection is waived as to the form of the question. 4 That all formalities and requirements of the Statute with respect to any formalities not herein expressly waived are hereby waived, especially including the right to move for the rejection of this deposition before trial for any irregularities in the taking of the same, either in whole or in part or for any other cause; 5 That the sealed original transcript of this deposition shall be mailed first-class postage or hand-delivered to the party taking the deposition or its attorney for preservation and delivery to the Court, if and when necessary</p> <p>Page 4</p>
<p>1 INDEX TO EXAMINATIONS & EXHIBITS 2 Examination Page 3 Direct by Mr. Meza 5 4 by Mr. Culpepper 44 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>Deposition Exhibit Page 30 43</p>	<p>Page 3</p> <p>1 ROBERT COLLINS, 2 having been duly sworn, 3 testified as follows: 4 DIRECT EXAMINATION 5 BY MR. MEZA: 6 Q. Good afternoon, Mr. Collins 7 A. Good afternoon 8 Q. My name is Jim Meza. I'm a lawyer for 9 BellSouth. I'm here to depose you 10 regarding issues that you've filed 11 testimony on in this arbitration between 12 BellSouth and KMC. 13 Have you been deposed before? 14 A. No, sir. 15 Q. No? 16 A. No, sir. 17 Q. Okay. First of all, you don't call me 18 sir. 19 A. It's a habit. I'm from the South. 20 Q. Make sure that's clear. 21 Second is I'm going to ask you a 22 series of questions, and I need for you to 23 provide a response -- a verbal response so 24 that the court reporter can accurately 25 reflect your response; okay?</p> <p>Page 5</p>

2 (Pages 2 to 5)

<p style="text-align: right;">Page 127</p> <p>1 A. It's the understanding set forth in the 2 Triennial Review. 3 Q. Can you explain to me practically how it 4 works? 5 A. Practically, the Triennial Review 6 established impairment standards and it 7 set forth terms and conditions when 8 certain UNE elements would be available, 9 understanding that the FCC was eliminating 10 some -- our ability to access some 11 facilities as UNEs, the FCC established 12 the right to commingle facilities in order 13 to allow us to take advantage of our 14 rights to access those UNEs, to commingle 15 those UNE facilities with other wholesale 16 services in order to produce this full 17 service offerings that we might have 18 traditionally gotten as a UNE. 19 So as an example, where prior to 20 the Triennial Review, a CLEC could have 21 purchased a UNE loop and a UNE transport 22 element and combined those elements in 23 order to produce an end-to-end service for 24 a customer, today, post-Triennial Review, 25 if we were no longer able to gain access</p>	<p style="text-align: right;">Page 129</p> <p>1 A. In paragraph 584, we changed the first 2 sentence to read: As a final matter, we 3 require that incumbent LECs permit 4 commingling of UNEs and UNE combinations 5 with other wholesale facilities and 6 services, including any services offered 7 for resale pursuant to Section 251(c)(4) 8 of the Act. 9 Q. Okay. And can you also refer to Exhibit 10 17, paragraph 584? 11 MR. CULPEPPER: It's the TRO. 12 Q. Which is the TRO. 13 A. Yes. 14 Q. And can you read the first sentence in 15 that paragraph? 16 A. As a final matter, we require that 17 incumbent LECs permit commingling of UNEs 18 and UNE combinations with other wholesale 19 facilities and services, including any 20 network elements unbundled pursuant to 21 Section 271 and any services offered for 22 resale pursuant to Section 251(c)(4) of 23 the Act. 24 Q. Would you agree with me that, in the 25 errata, the FCC deleted the portion of the</p>
<p style="text-align: right;">Page 128</p> <p>1 to that transport as a UNE, we would 2 purchase the UNE loop, purchase that 3 transport via any other wholesale access 4 method that we could, meaning either via 5 special access, 271 unbundling 6 obligations, or otherwise and combine that 7 service with our UNE loop. 8 Q. I'd like for you to -- well, strike that. 9 Are you familiar with the FCC's 10 errata on the TRO? 11 A. Yes. 12 Q. And do you believe that that errata is in 13 force and effect? 14 A. Yes. 15 Q. May I ask what you're looking at? 16 A. The errata. 17 MR. MEZA: Let's mark this as the 18 next exhibit, please. 19 (DEPOSITION EXHIBIT NO. 26 WAS MARKED.) 20 Q. Showing you my copy of the errata that's 21 marked as Exhibit 26. And I'd like to 22 refer your attention to number 27. Do you 23 see that? 24 A. Yes. 25 Q. And can you read it for me out loud?</p>	<p style="text-align: right;">Page 130</p> <p>1 first sentence of paragraph 584 that 2 provided any network element unbundled 3 pursuant to Section 271? 4 A. Yes. 5 Q. In your supplemental rebuttal testimony, 6 you state that the errata was nothing more 7 than an attempt to clean up stray 8 language. What do you mean by that? 9 A. The term that's used in paragraph 584 10 initially is other wholesale facilities 11 and services. Other wholesale facilities 12 and services are all encompassing. The 13 purpose of paragraph 584 was to clarify 14 with regard to Section 251(c)(4) that 15 wholesale services and facilities included 16 resale. 17 So if you look throughout 18 paragraph 584, paragraph 584 focuses on 19 Section 271(c)(4) of the Act throughout 20 that section, and that did not change in 21 errata. So as you can tell from this 22 paragraph, it was the FCC's intent to make 23 clear that UNEs could be combined with 24 resale services and that the term 25 wholesale facilities and services indeed</p>

3 (Pages 127 to 130)

<p style="text-align: right;">Page 131</p> <p>1 included, as a final matter, resale 2 services. 3 So the FCC's removal of the 4 portion of the sentence that says any 5 network elements unbundled pursuant to 6 Section 271 was clean up on the paragraph, 7 because the proceeding reference is to 8 other wholesale facilities and services. 9 And certainly 271 facilities are wholesale 10 facilities and services. The FCC made no 11 attempt to exclude 271 facilities or 12 services and, in fact, again, in 584 13 explicitly took every effort to make sure, 14 as a final matter, it was clear that 15 resale services were included. 16 Resale services can sometimes be 17 confused to be retail offerings, and I 18 don't think we would confuse 271 services 19 as retail services. 20 Q. On what basis do you believe that resale 21 offerings could be confused as retail 22 offerings? 23 A. Commonly, unfortunately, people refer to 24 them interchangeably. 25 Q. Do you think the FCC is confused as to</p>	<p style="text-align: right;">Page 133</p> <p>1 A. I don't know that I can point specifically 2 within the TRO. It's fairly dense, and I 3 haven't searched explicitly for that 4 reference, but I do note that in the 5 second sentence it does state that Section 6 251(c)(4) places the duty on incumbent 7 LECs not to prohibit and not to impose 8 unreasonable discriminatory conditions or 9 limitations on the resale 10 telecommunications services provided at 11 retail to customers who are not 12 telecommunications carriers. 13 Q. And that sentence you believe supports 14 your belief that there is confusion as to 15 whether or not resale services constitutes 16 a wholesale service? 17 A. First, recall that I'm not sure that I 18 could identify it without going through 19 this fairly dense document, your first 20 question. 21 Q. Uh-huh. 22 A. This sentence that I just pointed to you 23 clearly, again, focuses in my mind on the 24 point that the FCC was trying to make with 25 regard to paragraph 584, and that is, hey,</p>
<p style="text-align: right;">Page 132</p> <p>1 whether or not resale is a wholesale 2 services? 3 A. I think that the FCC believes that other 4 people were confused, which is why, in 5 paragraph 584, the FCC took effort to note 6 that, as a final matter -- my read on 7 that "as a final matter" is almost the 8 equivalence of, for avoidance of doubt, we 9 require that LECs permit commingling of 10 UNEs and UNE combinations for other 11 wholesale facilities, and, again, for 12 avoidance of doubt, that includes resale. 13 And, again, they throughout the rest of 14 the paragraph mention the 251(c)(4) resale 15 obligations. 16 Q. Where do you see any explanation by the 17 FCC that there is confusion as to whether 18 or not resale constitutes a wholesale 19 service? 20 A. Could you repeat your question? 21 Q. Yes. Where in the TRO do you see any 22 reference to the FCC stating there is 23 confusion in the industry or anywhere as 24 to whether or not resale constitutes a 25 wholesale service?</p>	<p style="text-align: right;">Page 134</p> <p>1 regardless as to what we may have all 2 understood, as a final matter, let's make 3 it clear in this paragraph 584 -- and I 4 am paraphrasing and giving you my 5 interpretation of paragraph 584 -- as a 6 final matter. And the fact that they use 7 the term "as a final matter" in my mind 8 says that there must have been some 9 confusion about resale and whether or not 10 it was included in the commingling 11 obligations. But as a final matter, the 12 FCC made effort in paragraph 584 to make 13 it explicit that resale services were 14 subject to commingling. 15 Q. Would you agree with me that 271 services 16 are not subject to TELRIC? 17 A. 271 services are subject to just and 18 reasonable pricing standards. And just 19 and reasonable in some cases has been 20 found to be TELRIC, so I would not agree 21 that 271 priced -- or 270 -- elements 22 provided under the 271 requirement or 23 obligations could not be priced at TELRIC 24 and sometimes are priced at TELRIC. 25 Q. In which instances, if you can remember,</p>

4 (Pages 131 to 134)

<p style="text-align: right;">Page 135</p> <p>1 has a 271 element been priced at TELRIC? 2 A. I don't recall offhand, because for the 3 most part the UNEs that KMC purchases are 4 251 UNEs today. 5 Q. So what is the basis for your belief that 6 271 elements have, in fact, been priced at 7 TELRIC? 8 A. What I actually said was I did not agree 9 with your statement that 271 elements 10 would not or could not be priced at 11 TELRIC. My understanding is that the 271 12 obligation is that rates be set at just 13 and reasonable rates. What I then said is 14 that just and reasonable has been found to 15 be TELRIC in some cases. 16 Q. All right. Identify those cases. 17 A. Interconnection facilities. 18 Q. Under the 251; correct? 19 A. Correct. 20 Q. Not under 271? 21 A. But the question was, when has just and 22 reasonable been found to be TELRIC 23 pricing. 24 Q. Is it your testimony that the standard in 25 201 and 202 has been determined to equal</p>	<p style="text-align: right;">Page 137</p> <p>1 Q. Do you believe that state commissions have 2 obligation to set rates under 201 or 202 3 of the Act? 4 A. I do. 5 Q. On what grounds do you make that 6 statement? 7 A. In the instant case -- in the case -- On 8 the grounds they're the ones deciding the 9 terms and arbitrating the terms that are 10 being brought to them in this arbitration 11 before them with ITC DeltaCom. And I 12 believe it is BellSouth. 13 Q. So you believe that a state commission has 14 the authority under the Act under Section 15 252 to set rates, terms, and conditions 16 under 201 and 202? 17 A. Yes. 18 Q. Has any state commission ever done that? 19 A. I haven't researched that issue for this 20 deposition today. 21 Q. Would you agree with me that a state 22 commission's rule under the federal act is 23 limited to Section 252 and 251? 24 A. This rule under the federal act as it 25 relates to interconnection or as it</p>
<p style="text-align: right;">Page 136</p> <p>1 TELRIC? 2 A. It's my understanding that just and 3 reasonable could be the equivalent of 4 TELRIC. It is just and reasonable, and it 5 would be up to the final decision maker in 6 the analysis to determine what's just and 7 reasonable and for each party to put on 8 its representation as to the appropriate 9 pricing, and then for the final decision 10 maker to establish what was the just and 11 reasonable pricing standard. 12 And there is nothing that would 13 prohibit just and reasonable in those 14 cases from being a TELRIC-based pricing 15 standard. 16 Q. Are you aware of any instance where a 201 17 or 202 service or element that's priced 18 pursuant to 201 or 202 has been found or 19 priced consistent with TELRIC methodology? 20 A. Not that I'm aware of, but I do believe 21 that there is a case -- there are some 22 arbitrations pending where that very issue 23 is being presented to commissions. I 24 believe the ITC DeltaCom arbitrations have 25 raised that very issue.</p>	<p style="text-align: right;">Page 138</p> <p>1 relates to its full authority? Could you 2 please be more specific? 3 Q. Yeah. Is it your understanding that a 4 state commission's role in a 252 5 arbitration, as it relates to federal 6 obligations, is to implement and resolve 7 issues relating to 251? 8 A. No. 9 Q. Do you believe that a 252 -- that 252 10 provides a state commission with authority 11 to resolve issues outside of 251? 12 A. Look at our current arbitration. It 13 includes issues that are outside of the 14 Act, such as indemnification, so the 15 commission certainly has the authority to 16 hear the issues brought forward under 17 arbitration. 18 Q. Do you believe that if one party -- Can 19 one party force another party to arbitrate 20 a non-251 issue simply by raising it as an 21 issue? 22 A. I'm not sure that I understand. 23 Q. Sure. 24 A. What's your question? 25 Q. One party -- If one party says, I don't</p>

5 (Pages 135 to 138)

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1 want to arbitrate this, this is not a 251
2 issue, do you believe by simply raising it
3 as an issue in a 252 arbitration that that
4 raising of the issue automatically grants
5 the commission with authority to resolve
6 the issue?
7 A. I believe that the commission has the
8 authority and the responsibility to
9 resolve the issue one way or another. One
10 resolution that the commission has an
11 opportunity to provide the parties is to
12 say, I don't believe that I have the
13 authority to decide that issue, party.
14 The other resolution would be for
15 them to actually issue an order on the
16 matter deciding the ultimate legal or
17 factual matter, but certainly the
18 commission would have the responsibility,
19 to the extent the issue was raised in the
20 context of the arbitration and brought
21 before them, to issue a decision one way
22 or the other.
23 Q. What other types of services are priced
24 pursuant to 201 or 202?
25 A. I believe special access.

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1 Q. Is special access priced pursuant to a
2 wholesale methodology?
3 A. I am not sure how the special access
4 prices are derived.
5 Q. Put it this way, is a special access
6 circuit more expensive than an EEL?
7 A. A special access circuit is traditionally
8 more expensive than an EEL.
9 Q. And do you know the magnitude of the cost
10 associated with a special access circuit
11 versus an EEL?
12 A. The magnitude varies.
13 Q. And do you know where the prices originate
14 from for a special access circuit?
15 A. Again, I'm not sure where the special
16 access prices originate. Are you
17 asking --
18 Q. Where do you buy them out of?
19 A. Oh.
20 Q. Sorry.
21 A. Out of a tariff.
22 Q. Okay. Is it possible that a price
23 established pursuant to 201 and 202 would
24 be priced in such a manner that it's still
25 just and reasonable but not a wholesale

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1 price?
2 A. What constitutes a wholesale price, in my
3 mind, is a price that a wholesale service
4 provider would pay for it. It is not
5 necessarily -- to wholesale and TELRIC, in
6 my mind, are not necessarily equivalent.
7 I've had wholesale pricing, and my
8 wholesale pricing for my wholesale
9 customers is not TELRIC.
10 Q. Is there anything in the TRO other than
11 paragraph 584 as it existed prior to the
12 errata that you believe supports your
13 position that you can commingle UNEs with
14 271 elements that BellSouth's not required
15 to provide under 251?
16 A. The Rule itself.
17 Q. Okay. Can you please refer me to that?
18 Which --
19 A. If you would reference the Rule 51.30 --
20 Section 51.309 -- I'm sorry, 51.315.
21 Okay. I just want to keep you flipping.
22 51.309. Sorry.
23 Q. As long as I don't flip out; right?
24 A. Right. Exactly.
25 51.309 is the section that

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1 describes the use of unbundled network
2 elements in the Triennial Review of the
3 rules that were issued as a result of the
4 Triennial Review Order. Section E of
5 Section 51.309 specifically states that,
6 except as provided in section 51.318, an
7 incumbent LEC shall permit a requesting
8 telecommunications carrier to commingle an
9 unbundled network element or a combination
10 of unbundled network elements with
11 wholesale services obtained from an
12 incumbent LEC.
13 And the reason that I believe that
14 this rule is absolute and explicit and
15 clear is if you reference the errata that
16 you provided and if you also reference
17 paragraph 584 where the commission went
18 through the effort to make it absolutely
19 clear, as a final matter, that resale was
20 included when it meant wholesale -- when
21 it said wholesale, it meant retail too,
22 then you come back to the way that the
23 commission actually drafted the rule
24 implementing the order, the commission
25 didn't feel the need to, again, say

<p style="text-align: right;">Page 143</p> <p>1 including resale, because it believes that 2 when it said wholesale services, it really 3 meant wholesale services and did not place 4 any limitations on the types of wholesale 5 services that were subject to 6 commingling. 7 So that limitation would not be 8 provided for 271 services, for resale 9 services, or for any other services. When 10 the commission in its rule said, wholesale 11 services, it meant cleanly, simply, and 12 plainly, commingling with wholesale 13 services. 14 Q. Do you believe that the FCC also found 15 that BellSouth does not have an obligation 16 to unbundle -- strike that. 17 Do you believe that BellSouth does 18 not have an obligation to commingle 19 network elements under 271? 20 A. I believe that BellSouth does not have an 21 obligation to commingle 271 elements with 22 each other -- or to combine, not to 23 commingle, because the FCC did not define 24 what commingling was until the context of 25 the Triennial Review Order. The 271</p>	<p style="text-align: right;">Page 145</p> <p>1 have commingled them to produce the 2 end-to-end service, the loop transport, 3 switching, whatever it is. 4 Now, combining, in my mind in the 5 context of the 271 limitation and not 6 having to combine 271 elements, my belief 7 is that the intent of the FCC is to limit 8 carrier's ability to recreate UNE-P. The 9 FCC does not want us to be able to combine 10 those 271 elements and put them all right 11 back together again. And what you 12 ultimately have by combining these 271 13 elements is a UNE-P circuit that you've 14 recreated the platform. So I believe that 15 the 271 limitation or -- that doesn't 16 provide for combining of those elements 17 means that you couldn't take all those 271 18 elements and put them together to recreate 19 the UNE-P circuit. It does not mean you 20 cannot commingle a 271 element with a 251 21 element, because the Act -- the order 22 specifically says, you can commingle 251 23 elements with any other wholesale service. 24 Q. Is there a definition of commingling in 25 the TRO?</p>
<p style="text-align: right;">Page 144</p> <p>1 obligations were not revisited or were 2 not -- the rules were not rewritten in 3 the Triennial Review. 4 So I think that the 271 rules say, 5 where you're looking at that language, 6 you're looking at the word combine. And 7 in the context of the Triennial Review and 8 in the context of EELs, we're using the 9 word commingle. 10 Q. And what's the difference between the two, 11 combining and commingling? 12 A. Commingling, in the instant case, in the 13 Triennial Review -- and assuming once we 14 have final rules going forward, 15 commingling means that we can take 16 facilities that are traditionally not 17 subject to combining and we can commingle 18 those facilities so that now you can 19 combine a UNE element with a non-UNE 20 element, which prior to the Triennial 21 Review, we could not do. 22 To derive a commingled circuit, 23 meaning you have two circuits that are 24 different -- that are provided to us 25 under different pricing principles, and we</p>	<p style="text-align: right;">Page 146</p> <p>1 A. There is a definition of commingling in 2 the TRO. 3 Q. Is there a definition of combining in the 4 TRO? 5 A. I don't recall if there is a definition of 6 combining in the TRO. 7 Q. So let me make sure I understand this. 8 You believe that under commingling you can 9 actively combine a UNE with a 271 element; 10 right? 11 A. I do. 12 Q. So, in effect, commingling really means 13 combining? 14 A. The difference here really is I'm allowed 15 to combine elements that have 16 different -- I don't want to call it 17 jurisdictional nature, but are different 18 in their regulatory characteristics. I'm 19 allowed to combine -- remember, the 20 prohibition prior to the Triennial Review 21 was that I could not combine UNE services 22 with tariffed services. I was not allowed 23 to commingle UNE and tariffed services. 24 Post-Triennial Review, the FCC 25 granted carriers the right to commingle</p>

7 (Pages 143 to 146)

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<p>1 UNE services with tariffed services or 2 other wholesale services in general. That 3 means we can now combine services that are 4 from different regulatory -- or of 5 different regulatory nature. I now can 6 combine tariff and non-tariff services, 7 UNE and tariff services. 8 Q. And just so that I'm clear on your 9 testimony relating to the errata, you 10 believe that -- well, before I say that, 11 did the errata come after the rules? 12 A. Yes. 13 Q. And what is your understanding of the 14 purpose of an errata? 15 A. The purpose of an errata is to correct 16 errors made in the original submission. 17 Q. And you believe that the FCC made the 18 change in the errata in paragraph 584 to 19 delete the reference to 271 elements to 20 make it clear that resale obligations 21 constitute a wholesale service? 22 A. To clean that paragraph up as, again, the 23 purpose of an errata is to correct 24 errors. Looking at the Exhibit 26, you 25 can see that there are several erratas</p>	<p>1 Thus, an incumbent LEC shall permit a 2 requesting telecommunications carrier to 3 commingle a UNE or UNE combination with 4 one or more facilities or services that a 5 requesting carrier has obtained at 6 wholesale from an incumbent LEC pursuant 7 to a method other than unbundling under 8 Section 251(c)(3) of the Act. 9 And if the FCC's errata on 10 paragraph 584 was truly intended to 11 eliminate the opportunity to combine or 12 commingle 271 elements with 251 elements, 13 the FCC would have had to adjust several 14 other references throughout the Triennial 15 Review, including paragraph 579, so the 16 word any would not be any. It would be 17 except for 271 services, the competitive 18 LECs can commingle. 19 So, I mean, again, the FCC's 20 pretty deliberate in its wording, and I 21 would expect that if it took the effort to 22 eliminate the right to commingle in 271 23 services, they would have done so 24 ubiquitously throughout the Triennial 25 Review.</p>
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<p>1 here, and many of them don't substantially 2 change the intent of the FCC's language. 3 However, they do clean up the FCC's order 4 and make it grammatically correct, 5 aesthetically better to read because 6 they've corrected their wording. 7 So I don't see the errata to 8 paragraph 584 as the FCC's attempt to 9 change its intent to allow commingling of 10 UNEs for all wholesale service. And, 11 indeed, if that was the intent of the FCC, 12 they missed several other erratas that 13 they should have also issued because they 14 would have also had to change paragraph 15 579, where in paragraph 579 they 16 specifically say, by commingling we mean 17 connecting, attaching, or otherwise 18 linking of a UNE or UNE combination to one 19 or more facilities or services that a 20 requesting carrier has obtained at 21 wholesale from an Incumbent LEC pursuant 22 to any method other than unbundling under 23 Section 251(c)(3) of the Act or the 24 combining of a UNE or UNE combination with 25 one or more such wholesale services.</p>	<p>1 Q. So it's your opinion that when the FCC 2 says something in the order, it means it? 3 A. It's my opinion that this particular 4 obligation was clear. It said wholesale 5 services, any wholesale service that's not 6 provided pursuant to 251(c)(3) of the Act. 7 Q. And why didn't you believe the inclusion 8 of the reference to 271 elements was an 9 error? 10 A. Because throughout the rest of paragraph 11 584, prior to the errata, it never 12 mentioned anything else about 271 13 obligations. The entire paragraph spoke 14 solely to 251(c)(4) obligations, which was 15 the obligation to commingle resale 16 elements. So it was -- the reference to 17 271 was, first of all, redundant because 18 the FCC had already said wholesale 19 services. 20 Then, secondly, it was displaced 21 because if the FCC really wanted to talk 22 about 271, they missed it because they 23 were talking specifically about, as a 24 final matter, making it clear that resale 25 was included and -- when they said</p>

8 (Pages 147 to 150)

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1 wholesale services.
2 Q. So you believe that paragraph 584 is
3 limited to the discussion of resale as it
4 relates to wholesale services and your
5 ability to combine or commingle?
6 A. I believe paragraph 584 was -- provided
7 an effort, an intent to clarify that, as a
8 final matter, when the FCC said wholesale
9 services, they meant resale was included
10 in the definition of wholesale services.
11 Q. Now, the context of line conditioning, do
12 you believe that the TRO should be given
13 any weight?
14 A. When you say, should the Triennial Review
15 be given any weight, in what regard?
16 Q. In regard to the definition of line
17 conditioning set forth in the TRO.
18 A. I do.
19 Q. Can you expound, please?
20 A. The Triennial Review provided a definition
21 of line conditioning, and I believe that
22 it even set that definition forth in the
23 rules, so it is absolutely the law to the
24 extent that it is not adjusted in any way
25 in the final rules.

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1 Q. Do you believe the definition of line
2 conditioning as it exists in the TRO is
3 law?
4 A. I do.
5 Q. Does KMC buy EELs from BellSouth?
6 A. Very limited use of EELs in BellSouth's
7 region.
8 Q. Has BellSouth asked to audit KMC's EELs?
9 A. Yes, BellSouth did once ask to audit KMC's
10 EELs.
11 Q. How long ago was that?
12 A. Maybe 18 to 24 months ago.
13 Q. And what was the result of that request?
14 A. I think that we spent some time
15 establishing the scope of the audit and
16 establishing -- or attempting to
17 establish the appropriate independent
18 auditor to conduct the audit. And the
19 last that I recall, the final -- the last
20 correspondence we provided BellSouth, we
21 did not receive a response.
22 Q. And this was pursuant to your current
23 agreement?
24 A. Pursuant to our current agreement.
25 Q. What is an EEL?

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1 A. An EEL is a loop transport combination and
2 may include mux-ing.
3 Q. Do you agree that a loop must terminate at
4 an end-user's premises?
5 A. I believe that the ultimate termination
6 point for a loop is an end-user's premise.
7 Q. Is KMC using EELs today for any other
8 purpose other than to serve an end user or
9 an ISP?
10 A. Could you be specific with the question?
11 Is KMC using an EEL for any other reason
12 than to service KMC's end user?
13 Q. Yes.
14 A. For them to service an end user.
15 Q. Thank you.
16 Is KMC using an EEL today for any
17 other reason other than to service a KMC
18 end user or an ISP?
19 A. KMC may be using EELs to serve an end user
20 that is a user of a wholesale customer of
21 KMC.
22 Q. Are you aware of any customers?
23 A. But I am not aware of any instance.
24 Q. Can you describe for me a situation where
25 -- that may arise where you would use an

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1 EEL to serve one of your wholesale
2 customers?
3 A. Yes. For example, if Xspedius did not
4 have switching in Tampa, Florida, and they
5 wanted to supplement their network in
6 order to provide service to an
7 enterprise-level customer that had service
8 throughout the nation and they needed to
9 pick up services from KMC in one location
10 to give that enterprise-level customer
11 ubiquitous service, we might purchase a
12 loop transport combination on Xspedius'
13 behalf and provide switching to Xspedius
14 to provide an ultimate service to
15 Xspedius' end user via an EEL. KMC has a
16 substantial wholesale service where we do
17 turnkey products.
18 Q. Whatever that means.
19 A. Whatever that means. Come on, my
20 marketing people have five different
21 products with the same facilities.
22 Q. Are you aware of any limitations as to the
23 manner in which a CLEC can use EELs?
24 A. Yes.
25 Q. What is your understanding?

<p>Page 155</p> <p>1 A. My understanding under the Triennial 2 Review or under the law prior to the 3 Triennial Review? 4 Q. Both. 5 A. Prior to the Triennial Review, there were 6 restrictions and limitations that if -- I 7 cannot recite verbatim, but primarily the 8 intent of those restrictions was to 9 disallow the use of EELs for interexchange 10 services for -- for services that were 11 primarily interexchange in nature. 12 Q. Okay. 13 A. The Triennial Review set forth revised EEL 14 limitations or restrictions. And, again, 15 the intent is the same, to disallow the 16 use of EELs for service that is primarily 17 interexchange and to focus the use of EELs 18 on the provisioning of local service. 19 Q. Are you aware of any type of certification 20 that a CLEC must make before purchasing an 21 EEL? 22 A. There are a number of ways that -- under 23 the rules, prior to the Triennial Review, 24 that the CLEC self-certify. One was that 25 -- by saying you were the service</p>	<p>Page 157</p> <p>1 first thing that KMC would like to see is 2 reasonable and adequate time. We believe 3 that reasonable time could be 30 days. 4 The second thing that KMC would 5 like to see is the scope of the audit so 6 that KMC can assess, again, the resources 7 necessary, the data, whether we have 8 access to that data, and the scope in 9 general of supporting the audit request. 10 So, secondly, KMC needs to understand the 11 specific scope of the audit and the audit 12 request. 13 Lastly, KMC needs to receive some 14 indication that the entity performing the 15 audit will be an independent third party 16 such that KMC can be sure that it 17 effectively manages any risk that it has 18 as well as any risk to BellSouth. So, 19 third, KMC needs to have assurance that 20 the audit will be conducted by a mutually 21 agreed to third-party independent auditor 22 to protect both KMC and BellSouth's 23 interest. 24 Q. Okay. A reasonable time period is your 25 first request, and you said 30 days</p>
<p>Page 156</p> <p>1 provider, the sole provider of local, 2 you were the customer's sole provider of 3 local telecommunication services -- or 4 maybe three ways to self-certify. 5 Q. And has KMC executed those 6 self-certifications? 7 A. KMC, for the EELs that KMC purchased, 8 would have executed those certifications. 9 Q. And the alternative to an EEL is a special 10 access circuit; correct? 11 A. Correct. 12 Q. And as we discussed already today, special 13 access is more expensive than an EEL? 14 A. Correct. 15 Q. So it's to the CLEC's advantage to use the 16 EEL for -- because it's cheaper? 17 A. Correct. 18 Q. What does KMC want included in an audit 19 request submitted to KMC for EELs? 20 A. In terms of language? 21 Q. Or notice. What do you want BellSouth to 22 put in its notice? 23 A. First and foremost, KMC would like that 24 notice to give us reasonable and adequate 25 time to prepare for the audit. So the</p>	<p>Page 158</p> <p>1 appears to be reasonable. Do you know if 2 BellSouth has agreed to that? 3 A. I believe that, in concept, we agree that 4 30 days is reasonable. The issue is what 5 that 30 days says. I believe that the 30 6 days for us is a 30-day notice that says 7 that BellSouth would like to conduct an 8 audit in 30 days or KMC to BellSouth could 9 say KMC would like to conduct an audit of 10 BellSouth's services in 30 days. 11 Now, whether or not that 30 days 12 is acceptable is a different issue, and I 13 think that's the issue that we have teed 14 up in this arbitration. 15 You know, my in-laws might call 16 and say, Martha, we would love to visit 17 you on Christmas. And I would love to see 18 my in-laws, and I certainly am not 19 avoiding them, but if Christmas is not 20 good because I'm not home or my floors are 21 being redone, it's not that I don't want 22 to see them, I love them, but we need to 23 talk about a date that's reasonable. And 24 I would be glad to work with them to 25 determine a date that's reasonable for</p>

10 (Pages 155 to 158)

<p>Page 159</p> <p>1 them to come and visit.</p> <p>2 And I think, again, that's the</p> <p>3 issue at hand in this arbitration is, it's</p> <p>4 acceptable to KMC that BellSouth propose</p> <p>5 to start an audit in 30 days or that KMC</p> <p>6 propose to start an audit in 30 days, but</p> <p>7 what we need is to be reasonable and to</p> <p>8 allow us to mutually agree when that</p> <p>9 actual date may be in order to make sure</p> <p>10 that we can reasonably commit to timing</p> <p>11 because resource allocations and schedules</p> <p>12 need to be coordinated.</p> <p>13 Q. Is it KMC's intentions to delay an audit</p> <p>14 when it's requested by BellSouth?</p> <p>15 A. It is not KMC's intention to delay an</p> <p>16 audit. It is KMC's intention to be sure</p> <p>17 that it can appropriately assign resources</p> <p>18 to an audit and that we make sure, again,</p> <p>19 that we protect both KMC's interests and</p> <p>20 BellSouth's interest by not defining the</p> <p>21 scope of an audit such that it's open --</p> <p>22 wide open and we aren't able to really</p> <p>23 focus in on the resources that are</p> <p>24 required, the documents that are required,</p> <p>25 and the time that's required to conduct</p>	<p>Page 161</p> <p>1 full resource and certain data, if</p> <p>2 BellSouth wants to take their audit beyond</p> <p>3 the scope of the resources, timing, and</p> <p>4 data that I've provided, I'm not going to</p> <p>5 be prepared to do so.</p> <p>6 In the interim, I've taken a</p> <p>7 resource out of my business that I've only</p> <p>8 planned to have out of my business to</p> <p>9 address maybe ten days' worth of issues.</p> <p>10 Now I've got a double problem, because, to</p> <p>11 the extent the scope goes beyond what I</p> <p>12 thought the resource allocations and the</p> <p>13 data information I've provided required, I</p> <p>14 now have -- and I've got other people</p> <p>15 that are managing widget. I now have to</p> <p>16 adjust my widget management and my factory</p> <p>17 on this side and, in addition, expand the</p> <p>18 scope and the resource that I've given to</p> <p>19 conduct the audit.</p> <p>20 One reasonable way to address</p> <p>21 that, if BellSouth saw that based on the</p> <p>22 initial scope it said that it needed</p> <p>23 additional audit, it could supplement</p> <p>24 their request for audit to expand, and</p> <p>25 then we could revise and revisit the</p>
<p>Page 160</p> <p>1 the proposed audit.</p> <p>2 Q. Okay. Let's say that you receive the</p> <p>3 notice on May 1st. And based upon your</p> <p>4 understanding of the limited number of</p> <p>5 EELs that KMC has with BellSouth, do you</p> <p>6 think 30 days would be sufficient to start</p> <p>7 the audit?</p> <p>8 A. On May 1st. Is the scope of the audit</p> <p>9 defined?</p> <p>10 Q. We'll get to that.</p> <p>11 A. Okay.</p> <p>12 Q. I guess your answer would be what?</p> <p>13 A. It depends on the scope of the audit.</p> <p>14 Q. Okay. Which -- I guess the next</p> <p>15 question, is it your intention that the</p> <p>16 audit would be limited to the circuits</p> <p>17 that BellSouth has reason to believe are</p> <p>18 not in compliance?</p> <p>19 A. Yes.</p> <p>20 Q. And why is that?</p> <p>21 A. Because that is what BellSouth has asked.</p> <p>22 Otherwise, I would be opening my resources</p> <p>23 up to basically a blank slate. And if</p> <p>24 I've committed to provide BellSouth, in</p> <p>25 order to help them conduct their audit, a</p>	<p>Page 162</p> <p>1 resources and the scheduling.</p> <p>2 I used to be an auditor. I worked</p> <p>3 for Arthur Anderson. Before I went to my</p> <p>4 client's site, I sent a list. We've</p> <p>5 scheduled an audit. They confirmed that</p> <p>6 audit time still works. We produced a</p> <p>7 schedule for our audits. We worked with</p> <p>8 our clients to establish their resources</p> <p>9 required for that audit. If the scope of</p> <p>10 my audit changed or my resource needs</p> <p>11 changed, I had to submit a change</p> <p>12 request.</p> <p>13 I was an internal auditor for</p> <p>14 BellSouth, I would never show up at one of</p> <p>15 my internal client locations and demand</p> <p>16 that the date that I had set for their</p> <p>17 audit be the date that they actually</p> <p>18 submitted their resources. I negotiated</p> <p>19 with my internal clients a date. I</p> <p>20 negotiated with them resources. And if</p> <p>21 the scope of my audit changed, I worked</p> <p>22 with them to try to make sure that I</p> <p>23 accommodated them to run a business. And</p> <p>24 that's all we're asking for in the scope</p> <p>25 of our requirements, is that we be given</p>

<p style="text-align: right;">Page 163</p> <p>1 that same opportunity to properly assign 2 resources and to properly support the 3 audit request. 4 Q. What resources do you need to allocate for 5 the receipt of a notice of an audit? 6 A. Depending on the scope of the audit -- 7 again, but, at a minimal, assuming that 8 you may need access to KMC's customer 9 records or provisioning records, I would 10 have to provide you with someone from our 11 provisioning center, because you don't 12 have access to KMC's systems, to print 13 documents or produce documents that 14 BellSouth might like. Someone from, 15 perhaps, KMC's access cost management 16 group that would help to the extent -- 17 I'm sorry, not the access cost management 18 group but the subscriber billing group 19 that might be able to help assess any 20 customer-related usage questions or 21 concerns that were needed in order to 22 address the scope of the audit. I might 23 also have to produce someone from my legal 24 group that says that here's this 25 customer's contracts and here are the</p>	<p style="text-align: right;">Page 165</p> <p>1 when you do find it. 2 A. I will. In paragraph 621 of the Triennial 3 Review, the commission says, the 4 commission also found that, to confirm 5 reasonable compliance with the local usage 6 requirements in this order, incumbent LECs 7 may conduct limited audits only to the 8 extent reasonably necessary to determine a 9 requesting carrier's compliance with the 10 local usage options identified by the 11 carrier. 12 Then further down in that 13 paragraph the commission goes on to say, 14 moreover, the commission concluded that 15 audits will not be routine practice but 16 will only be undertaken when the incumbent 17 LEC has a concern that a requesting 18 carrier has not met the criteria for 19 providing a significant amount of local 20 exchange service. 21 Let me make sure I didn't read -- 22 okay. 23 My apologies. I read you the old 24 vatic on the auditing provisions. 25 Q. Okay.</p>
<p style="text-align: right;">Page 164</p> <p>1 types of services that this customer's 2 agreement allows it to utilize under its 3 contracts. 4 Depending on the scope of the 5 audit, I may have to touch three groups in 6 order to produce all of the information 7 necessary for BellSouth to be comfortable 8 with the data that it gets and its ability 9 to make its assertion as to whether or not 10 we're using services in compliance with 11 our agreement. 12 Q. Is it your belief that the audit should be 13 limited to the circuits that BellSouth 14 believes are not in compliance based 15 solely on the fact that you may have 16 resource issues if it's a full audit? 17 A. Correct. That is primarily my concern. 18 Q. Is there anything in the TRO that provides 19 that BellSouth is only given the right to 20 audit a subset of your circuits -- or, I 21 mean, of your EELs? 22 A. I do believe that the TRO explicitly 23 says -- and let me find it, if you don't 24 mind. 25 Q. Sure. And please refer to the paragraph</p>	<p style="text-align: right;">Page 166</p> <p>1 A. If you go to 626 -- 626. It essentially 2 says nearly the same, but in 626, the 3 commission said that we conclude that the 4 incumbent LECs should have a limited right 5 to audit compliance with the qualifying 6 service eligibility criteria. 7 In particular, we conclude that 8 incumbent LECs may obtain and pay for an 9 independent auditor to audit, on an annual 10 basis, compliance with the qualifying 11 service eligibility criteria. We conclude 12 that an annual audit right strikes the 13 appropriate balance, et cetera. 14 Q. Is there anything in there that suggests 15 that BellSouth is limited to only auditing 16 circuits that it identified in a notice? 17 A. Let's be clear on a couple of things. 18 Q. Okay. 19 A. This provision speaks particularly to the 20 audit of EEL circuits. So as an example, 21 I would expect that BellSouth's audit be 22 limited to EELs circuits, so I would 23 expect that BellSouth's notice would be 24 specific to EELs services. So that's one 25 limitation in and of itself.</p>

12 (Pages 163 to 166)

<p style="text-align: right;">Page 167</p> <p>1 And does the order specifically 2 say that BellSouth can only audit the five 3 circuits it believes causes a concern? 4 No. But I will tell you as a practice, as 5 an auditor, what we did is we used 6 statistical sampling in order to limit 7 resource drains on our clients. And I did 8 this as an auditor with Arthur Anderson as 9 well as with BellSouth. So I would never 10 go in and purport to audit every single 11 element in an inventory of my clients 12 if -- unless the statistical sample and 13 the preliminary analysis that I did led me 14 to conclude that there was some reason 15 that I needed to specifically audit a 16 broader and more -- a more specific set 17 of services. 18 So, again, it's a resource issue. 19 I would not expect BellSouth, if I had 20 2,000 EELs, to come in and audit 2,000 EEL 21 circuits. It's not reasonable or 22 practical from a business perspective. 23 Arthur Anderson wouldn't come in -- or if 24 they were in business, or Coopers wouldn't 25 come in or Deloitte wouldn't come in and</p>	<p style="text-align: right;">Page 169</p> <p>1 report will conclude whether the 2 competitive LEC complied in all material 3 respects with the applicable service 4 eligibility criteria. Consistent with the 5 auditing practices and such audits require 6 compliance testing designed by the 7 independent auditor, which typically 8 include an examination of a sample 9 selected in accordance with the 10 independent auditor's judgment. 11 So while, again, the order doesn't 12 explicitly say BellSouth must identify six 13 circuits it wants to audit, it does 14 specifically provide for the type of 15 auditing and materiality and resource 16 concerns and issues that I expressed by 17 stating that the audit should typically 18 include an examination of a sample 19 selected in accordance with the 20 independent auditor's judgment. 21 Q. Sample of the entire universe of EELs -- 22 A. Correct. 23 Q. -- is that your understanding? 24 Are you aware if joint -- other 25 Joint Petitioners in this proceeding have</p>
<p style="text-align: right;">Page 168</p> <p>1 audit 2,000 circuits, unless there was a 2 reasonable belief that led them to 3 conclude that the full audit was 4 necessary. They would conduct statistical 5 samples. 6 And if the statistical sample led 7 them to believe that a more detailed or 8 more expensive audit was necessary, then 9 they might go further. So it's a matter 10 of resources at the end of the day. 11 Q. Is there anything in TRO that says that 12 BellSouth needs to identify specific 13 audits it plans to circuit -- it wants to 14 audit? 15 (PAUSE.) 16 A. Again, just to be certain that I'm 17 addressing your question. I want to make 18 it clear that what the audit provisions 19 under the Triennial Review provide for are 20 as follows: In terms of assessing the 21 materiality, the order says that -- in 22 paragraph 626, we know that because of the 23 concept of material -- because of the 24 concept, the materiality governs this type 25 of audit. The independent auditor's</p>	<p style="text-align: right;">Page 170</p> <p>1 taken the position that BellSouth is 2 limited to auditing only those circuits 3 that it has reason to believe are not in 4 compliance and not the sampling that 5 you're referencing? 6 A. I believe that our current agreement would 7 set forth those exact provisions. 8 Q. Are you aware of any Joint Petitioners in 9 this arbitration proceeding, as it relates 10 to this issue, have taken the position 11 that BellSouth's audit rights are limited 12 to those circuits that it identifies in 13 the notice? 14 A. I believe that -- If I could have our 15 exact reference that you're pointing to in 16 the testimony. 17 Q. I'm not saying it's on the testimony. 18 A. Oh, okay. 19 Q. I'm asking, are you aware of that? 20 A. I'm not sure where that perception is 21 being derived from. Is it being derived 22 from -- You're saying it's not being 23 derived from testimony? 24 Q. I'm just asking, are you aware? Yes or 25 no?</p>

13 (Pages 167 to 170)

<p>Page 171</p> <p>1 A. Could you repeat your question?</p> <p>2 Q. Are you aware of any Joint Petitioner in</p> <p>3 this proceeding, as it relates to this</p> <p>4 issue in the arbitration for the future</p> <p>5 agreement, has taken the position that</p> <p>6 BellSouth's audit rights are strictly</p> <p>7 limited to circuits that it identifies in</p> <p>8 the notice?</p> <p>9 A. It's my understanding that the Joint</p> <p>10 Petitioners have taken the position that</p> <p>11 we'd like to have specific circuits</p> <p>12 identified in the scope of the notice so</p> <p>13 that we can properly prepare resources and</p> <p>14 documentation necessary to assist</p> <p>15 BellSouth with its request to audit.</p> <p>16 If BellSouth would like to, as a</p> <p>17 result of its initial audit, expand the</p> <p>18 scope of its audit to other circuits, it</p> <p>19 is my understanding that Joint Petitioners</p> <p>20 would comply with a subsequent request for</p> <p>21 BellSouth to expand its audit.</p> <p>22 But, again, the focus is on being</p> <p>23 able to prepare and to properly</p> <p>24 accommodate the resources and the data</p> <p>25 requested. And the way that we can do</p>	<p>Page 173</p> <p>1 A. Could you --</p> <p>2 Q. I asked you, are you aware of any Joint</p> <p>3 Petitioner who has taken the position that</p> <p>4 BellSouth cannot audit any circuits other</p> <p>5 than those that it identified in the</p> <p>6 notice? Yes or no?</p> <p>7 A. I'm not aware of that.</p> <p>8 Q. All right. And it's also your opinion</p> <p>9 that your proposal in this proceeding is</p> <p>10 identical to conducting a random sampling</p> <p>11 of the entire universe of EELs as the body</p> <p>12 of circuits that would be audited?</p> <p>13 MR. CAMPEN: Objection to form. I</p> <p>14 don't believe that's her testimony.</p> <p>15 Q. Is it your testimony that the sampling</p> <p>16 that you've talked about, about in your</p> <p>17 experience how it's done to get an</p> <p>18 understanding of what should be audited,</p> <p>19 is identical to the process and procedures</p> <p>20 that you're recommending in this</p> <p>21 arbitration proceeding?</p> <p>22 A. It's my testimony that, as I just noted,</p> <p>23 that that's one method for producing a</p> <p>24 list of specific services subsequent to</p> <p>25 the audit. BellSouth could -- If it had</p>
<p>Page 172</p> <p>1 that -- and I did this as an auditor even</p> <p>2 at Arthur Anderson, once we got the scope</p> <p>3 of the engagement down, I wouldn't just</p> <p>4 walk into my client's office and say, give</p> <p>5 me all the data. I'd go in and say,</p> <p>6 here's my statistical sample. As a</p> <p>7 result, I've decided, given this</p> <p>8 population size, it's safe for me to do a</p> <p>9 sampling of 1 percent of the widgets.</p> <p>10 Based on the 1 percent of the widgets as</p> <p>11 my population size, I've run a query and</p> <p>12 I've produced these random 1 percent</p> <p>13 widgets. Would you please produce all</p> <p>14 data records and other information for</p> <p>15 these specific widgets I've identified via</p> <p>16 my random sample so that I can audit</p> <p>17 them?</p> <p>18 And that's no different than what</p> <p>19 we've requested. We just want to know</p> <p>20 which specific circuits you want to audit</p> <p>21 so that we can properly provide you</p> <p>22 records and resources to conduct your</p> <p>23 audit.</p> <p>24 Q. With all due respect, Ms Johnson, you did</p> <p>25 not answer my question.</p>	<p>Page 174</p> <p>1 other reason to identify specific circuits</p> <p>2 it would like to audit, produce its list</p> <p>3 some other way.</p> <p>4 The point is that we need to</p> <p>5 understand specifically what BellSouth</p> <p>6 wants in order to produce data to</p> <p>7 accommodate BellSouth's request. A vague,</p> <p>8 ambiguous audit request doesn't help</p> <p>9 BellSouth and it doesn't help us because</p> <p>10 it doesn't help us produce the resources</p> <p>11 and data that are necessary for you to</p> <p>12 conduct your audit.</p> <p>13 In fact, it would be inefficient,</p> <p>14 as it would require us spending time</p> <p>15 randomly sorting through information</p> <p>16 throughout the process rather than helping</p> <p>17 us to organize and focus.</p> <p>18 Q. Is it your testimony that a notice</p> <p>19 provision stating that BellSouth has cause</p> <p>20 without identifying particular circuits</p> <p>21 but conducting a random sample of the</p> <p>22 universe of circuits for the audit would</p> <p>23 be insufficient?</p> <p>24 A. It would be insufficient to allow me to</p> <p>25 actually schedule your audit without</p>

14 (Pages 171 to 174)

<p style="text-align: right;">Page 175</p> <p>1 knowing more specifically the size of your 2 random sampling, the circuits that you 3 want to sample. I'm not sure if you 4 understand that KMC provides service in 17 5 states on a facilities-based perspective. 6 We are not centralized. We have services 7 and employees in 35 cities, so -- and all 8 of those records are not mechanized. So 9 without me actually having -- at least 10 working through it and the planning and 11 scheduling process with BellSouth, having 12 specific information to be able to 13 identify specific circuits, I cannot 14 guarantee that I'll be able to produce 15 information that is necessary for you to 16 conduct your audit, because I may actually 17 physically have to go to cities to recover 18 information that is manually on file. 19 In fact, that was one of our 20 challenges in responding to discovery 21 requests in the context of the Triennial 22 Review. We had to physically go to cities 23 to produce physical papers. We don't have 24 an expansive, sophisticated, mechanized 25 way to produce all information. I wish we</p>	<p style="text-align: right;">Page 177</p> <p>1 project management. In order to truly 2 assign resources and to make sure that we 3 can support the audit, it's absolutely 4 imperative that you manage the scope of 5 the engagement. 6 Q. How long would an audit take, in your 7 mind, of auditing KMC's EELs? 8 MR. CAMPEN: Objection to the 9 form. 10 A. It depends on how many circuits and the 11 scope of the audit. 12 Q. Let's take all of KMC's EELs. How long 13 would that take? 14 A. Okay. Let's say theoretically that 15 BellSouth wanted to audit KMC's EELs 16 because you believe that we don't qualify 17 under the self-certification parameters we 18 set forth. And if -- we generally 19 certify that we are the primary local 20 service provider for the end user. If all 21 you wanted to see in the scope of your 22 audit in order to complete your audit test 23 was an LOA from a customer that says, yes, 24 I'm going to sign up for -- KMC as my 25 primary local provider, that could take a</p>
<p style="text-align: right;">Page 176</p> <p>1 did. So, again, identifying specific 2 circuits helps us make the process more 3 effective. 4 Q. And it's your opinion that the audit 5 should be limited to those specific 6 circuits identified; correct? 7 A. Your initial audit should be, correct. 8 Q. Even though, in your experience, an audit, 9 if I understand you correctly, is 10 conducted pursuant to any -- or the scope 11 of the audit is conducted after performing 12 a sample of the universe to determine what 13 percentage of the universe you need to 14 actually review to get a full assessment 15 of compliance or non-compliance? 16 A. And as I noted, if I, in the scope of my 17 initial assessment, determined, based on 18 my first review, that I needed to conduct 19 further analysis, I would go back and 20 revise scope and advise my client that I 21 needed additional information, which would 22 allow them to assign additional resources, 23 which would allow us to reset the scope of 24 that particular portion of the audit. 25 It's really just -- It's basic</p>	<p style="text-align: right;">Page 178</p> <p>1 week because I could pull all the papers 2 -- depending on what else is going on in 3 the business, we could locate all the LOAs 4 and produce those for BellSouth, if that's 5 all you wanted to see in the scope of your 6 audit. 7 But if BellSouth's audit test 8 dictated that it needed to see the LOA, 9 uses on the customer's records and files, 10 switch recordings to make sure that the 11 usage on the customer's records and files 12 matched, switch recordings, you know, and 13 physical circuit layouts to make sure that 14 the customer was really at an end-user 15 premise and do some 911 testing to make 16 sure that the circuit was, indeed, capable 17 of providing 911, that type of audit could 18 take 60 days, depending on scheduling and 19 customer availability. 20 Again, that's why it's important 21 for us to understand the scope of the 22 test, the scope of what you want to get 23 accomplished, so that we can properly 24 respond, because depending on what 25 BellSouth believes is its test to assert</p>

15 (Pages 175 to 178)

<p style="text-align: right;">Page 179</p> <p>1 whether or not we're complying or not 2 complying, different requirements are 3 going to be made of KMC and KMC's 4 resources. 5 Q. If KMC -- BellSouth determines and the 6 auditor determines that after review of 7 the initial circuits identified that there 8 needs to be a more robust audit, would KMC 9 object to that audit going forward, that 10 second audit? 11 A. I'm not sure -- When you say, would we 12 object -- 13 Q. Would KMC oppose an auditor's decision to 14 expand the scope of the initial audit? 15 A. Are you asking would we comply with it or 16 would we -- when you say object, I'm not 17 sure -- 18 Q. Okay. Would you refuse -- Would you 19 refuse for the audit to be expanded 20 pursuant to an auditor's request that the 21 scope of the audit be expanded? 22 A. The reason I'm hesitating to answer your 23 question is that it isn't specific, 24 meaning that if BellSouth asks us to 25 expand the scope of the audit, we would</p>	<p style="text-align: right;">Page 181</p> <p>1 A. The commission says that the standard 2 accounting and auditing principle should 3 be used. 4 Q. As an auditor, what is that? Do you know? 5 A. Samples. 6 Q. And what percentage do you think 7 warrants -- 8 A. It depends on the sample size. It depends 9 on the initial size. I mean, it's all 10 statistical. 11 Q. Okay. 12 A. It depends on the -- 13 Q. Give me a range. 14 A. -- confidence level that you want to reach 15 with regard to the result. It depends 16 again -- 17 Q. So there are instances where the auditor 18 selects a -- strike that. 19 Let's take your proposal and play 20 it out. BellSouth -- You win on this 21 issue. BellSouth notifies you of the 22 individual circuits that it wants to 23 audit, okay? 24 In that instance, there isn't a 25 sample being done because BellSouth is</p>
<p style="text-align: right;">Page 180</p> <p>1 need to go and evaluate, just as we did 2 initially, the resources required, the 3 timing. 4 I wouldn't expect BellSouth to 5 tell me that it needs to evaluate ten 6 circuits, for me to produce the data and 7 resources to assist BellSouth in auditing 8 ten circuits, and to expect that that was 9 going to take two days. And for BellSouth 10 on the second day to say, we're going to 11 expand the schedule of this audit, KMC. 12 It's going to take 30 days and I'm going 13 to audit a thousand circuits and for me 14 to -- and for BellSouth to expect me to 15 say, okay, well, great, just stay around. 16 Of course I'd have to have adequate time 17 to evaluate the scope, timing, and 18 resources necessary to accommodate your 19 expanded request. 20 Q. Who would determine, in your mind, whether 21 or not the audit should be expanded to 22 include additional circuits. 23 A. The independent auditor. 24 Q. And what standard do you think should be 25 used?</p>	<p style="text-align: right;">Page 182</p> <p>1 limited to auditing only those audits -- 2 only those circuits, whatever percentage 3 that may be, of the universe in its 4 audit. 5 A. Yeah. 6 Q. So -- And the auditor -- the independent 7 auditor determines that after its review 8 of these ten circuits that there needs to 9 be an additional audit done of the entire 10 universe. 11 What would be the standard to 12 which KMC would not object to the auditor 13 applying to determine whether an 14 additional audit needs to be done? 15 MR. CAMPEN: Object as to form. 16 A. GAAP. The independent certified 17 professional accountants are going to be 18 conducting their audit according to the 19 AICPA rules, the GAAP, so -- I'm not 20 practicing as a CPA. 21 Q. Sure. 22 A. So whatever those rules are in 2004 would 23 set the standards for whether or not that 24 auditor should, in his independent 25 assessment, move forward and expand the</p>

16 (Pages 179 to 182)

<p>Page 183</p> <p>1 scope of his audit.</p> <p>2 Q. And do you think that by limiting the</p> <p>3 initial scope of the audit to those</p> <p>4 circuits that BellSouth identified somehow</p> <p>5 excuses or modifies those GAAP standards?</p> <p>6 A. Actually, I think that if BellSouth has</p> <p>7 concern that causes them to focus in on a</p> <p>8 specific subset of circuits and it is</p> <p>9 those circuits that the initial audit is</p> <p>10 conducted as a result of, it could skew</p> <p>11 the statistical result.</p> <p>12 For example, if BellSouth's</p> <p>13 concern is based on ten circuits and it</p> <p>14 had reasonable cause to have concern about</p> <p>15 those ten circuits, and let's just say in</p> <p>16 this case BellSouth's concern was well</p> <p>17 founded and all ten circuits were indeed</p> <p>18 non-compliant, it could look like a</p> <p>19 hundred percent then of the circuits might</p> <p>20 be non-complaint because that's the</p> <p>21 statistical result.</p> <p>22 But, remember, you're not using a</p> <p>23 random sample. I'm sure that the auditor,</p> <p>24 in his independent assessment, would</p> <p>25 adjust for the fact that the initial test</p>	<p>Page 185</p> <p>1 BellSouth had a concern about specific</p> <p>2 circuits, BellSouth would identify them.</p> <p>3 The auditor would audit compliance only.</p> <p>4 And if those circuits were found to be</p> <p>5 non-compliant, then the pricing would be</p> <p>6 adjusted as set forth in paragraph 627 of</p> <p>7 the Triennial Review. I think that's the</p> <p>8 most efficient process.</p> <p>9 You asked the question better off</p> <p>10 or not better off.</p> <p>11 Q. Sure.</p> <p>12 A. It is what it is. We believe we comply,</p> <p>13 so...</p> <p>14 Q. You would agree with me that by starting</p> <p>15 with identified circuits as the floor or</p> <p>16 the base for the audit may skew the</p> <p>17 percentage of non-compliance as it relates</p> <p>18 to the entire universe?</p> <p>19 A. It may.</p> <p>20 Q. Okay. And if BellSouth selects an auditor</p> <p>21 that is AICPA compliant, why does KMC have</p> <p>22 concern about the Independents of the</p> <p>23 auditor?</p> <p>24 A. Because it's like selecting an attorney.</p> <p>25 Attorneys generally are bound by</p>
<p>Page 184</p> <p>1 group was not one that was randomly</p> <p>2 chosen.</p> <p>3 Q. So do you think KMC would be better off by</p> <p>4 simply allowing the auditor to conduct a</p> <p>5 random sample of all of the circuits?</p> <p>6 A. When you say better off, KMC believes it</p> <p>7 complies with the standard set for use for</p> <p>8 EELs. So KMC believes that, regardless of</p> <p>9 the methodology chosen to conduct the</p> <p>10 audit, KMC circuits will pass the</p> <p>11 compliance test.</p> <p>12 Q. And I'm sure that may be the case, but my</p> <p>13 question to you is, do you believe that</p> <p>14 a -- under your proposal about a second</p> <p>15 audit being conducted pursuant to the</p> <p>16 results of the audit of particularly</p> <p>17 identified circuits that there may be an</p> <p>18 instance or possibility that they would be</p> <p>19 less likely, the result of a second audit</p> <p>20 or an additional audit if, in fact, the</p> <p>21 original audit was based upon a sample of</p> <p>22 the entire universe rather than on</p> <p>23 identified circuits?</p> <p>24 A. Well, what KMC actually believes is that</p> <p>25 the most efficient process is that if</p>	<p>Page 186</p> <p>1 professional ethic standards. And if you</p> <p>2 ask any attorney to consult, he's going to</p> <p>3 tell you he's going to comply with the</p> <p>4 ethical profession of his craft.</p> <p>5 Accountants are no different. Each of</p> <p>6 them believes and endeavors to be</p> <p>7 independent in their assessment and their</p> <p>8 issuance of their opinions as it relates</p> <p>9 to professional matters in their field.</p> <p>10 But the fact is that there may, in fact,</p> <p>11 be conflicts.</p> <p>12 So if I went to -- I can't think</p> <p>13 of a law firm that BellSouth uses as</p> <p>14 outside counsel -- but if I went to</p> <p>15 BellSouth's outside counsel to ask</p> <p>16 BellSouth's outside counsel to handle a</p> <p>17 litigation matter for me, that attorney,</p> <p>18 as a professional individual, as a member</p> <p>19 of the bar, would certainly think that he</p> <p>20 could represent me judiciously and</p> <p>21 ethically without causing concern for his</p> <p>22 craft. However, the fact is, is</p> <p>23 ultimately he also represents BellSouth</p> <p>24 and there is a conflict of interest that</p> <p>25 may arise. So that independent also needs</p>

<p style="text-align: right;">Page 187</p> <p>1 to include for potential for conflict. 2 And as an sample, if an auditor 3 such as Deloitte asked KMC, can I conduct 4 this EELs audit at BellSouth's request, if 5 Deloitte was also the accounting firm that 6 conducted my audit of my financials and 7 included in that audit somehow overall 8 compliance testing which would presume to 9 encapsulate some of the issues which might 10 be at issue in BellSouth's audit, Deloitte 11 might have a conflict because -- not that 12 they're not independent, it's just they've 13 got a conflict because they've given an 14 opinion on a matter as it relates directly 15 or indirectly to the issue that BellSouth 16 has asked it to evaluate. So we have to 17 couple the concept of independence and the 18 conflict issue into assess that 19 independence. 20 Again, though they're bound by 21 their ethical standards and the code set 22 for in the AICPA, if Deloitte represents 23 BellSouth in the same way in those other 24 financial-related matters and audits for 25 BellSouth, it might have a reason when</p>	<p style="text-align: right;">Page 189</p> <p>1 provision in the TRO that says that there 2 needs to be mutual agreement on a 3 selection of the auditor? 4 A. I'd like to draw your attention to 5 paragraph 625 of the Triennial Review. 6 Q. Okay. 7 A. Where the commission says, for threshold 8 matter, we set forth basic principles 9 regarding our carrier's rights to be 10 undertaken and defend against audits. 11 However, we recognize that the details 12 surrounding the implementation of these 13 audits may be specific to related 14 provisions of interconnection agreement or 15 to the fact of a particular audit and that 16 the states are in a better position to 17 address that implementation. 18 For example, to the extent that 19 the parties dispute the definition of an 20 independent auditor and whether a given 21 party satisfies the test for independence, 22 the more appropriate forum for this 23 determination is a state commission. 24 So I believe that the FCC 25 anticipates that we should agree as to</p>
<p style="text-align: right;">Page 188</p> <p>1 it's doing EELs audits for BellSouth to 2 make sure that those EEL audits reflect 3 what they said in their audit on 4 BellSouth's financials. And, yes, they're 5 bound to ethical standards, but I just see 6 that as a conflict that -- that -- you 7 know, that overrides their independence or 8 ability to be independent, so... 9 Q. Would you agree with me that it is the 10 obligation of the auditor to determine 11 whether or not there would be a conflict? 12 A. No. I believe it's the parties' mutual 13 agreement that determines whether or not 14 an auditor is conflicted and, therefore, 15 is not able to be independent. 16 Q. So you're saying, regardless of whether 17 the auditor complies with AICPA standards 18 and asserts that there is no conflict of 19 interest and asserts that he or she can be 20 independent, you believe that there still 21 needs to be a mutual agreement of the 22 parties regarding a selection of the 23 auditor? 24 A. I do. 25 Q. Is there any paragraph in the TRO or</p>	<p style="text-align: right;">Page 190</p> <p>1 whether a particular auditor is 2 independent. And to the extent that we 3 don't mutually agree, it was the FCC's 4 intent to have those issues resolved by 5 the state commission. 6 Q. Okay. Would you agree with me, simply 7 because one portion of an accounting firm 8 may or may not have done work for one of 9 the companies participating in the audit, 10 does not necessarily create a conflict of 11 interest? 12 A. I do agree that a, quote, unquote, Chinese 13 wall can be drawn in matters. 14 Q. Okay. And can you also agree with me that 15 if KMC has concerns about the 16 independentness of an auditor that he can 17 raise those concerns during or after the 18 audit? 19 A. What I actually believe that the order 20 allows for is for us to agree in advance. 21 And I believe that surely if the reason 22 that it's important for an auditor to be 23 independent is so that my rights or your 24 rights aren't harmed, then to allow an 25 auditor that is not independent to move</p>

18 (Pages 187 to 190)

<p style="text-align: right;">Page 191</p> <p>1 forward with an audit is a waste of our 2 resources. And it also subjects me to 3 risk and harm unnecessarily. So I believe 4 it is important and critical that the 5 parties mutually agree or that the 6 commission decide, in the absence of 7 mutual agreement as to the independence of 8 an auditor before the audit proceeds so 9 that no party is harmed unnecessarily. 10 Q. And would you agree with me that a 11 disagreement over the independentness of 12 an auditor could result in a delay of the 13 audit? 14 A. It could. The parties could negotiate on 15 as to what constitutes an independent 16 auditor. They could negotiate language 17 around that exact point. 18 Q. And you believe that agreeing to an 19 auditor that complies with the applicable 20 standards is not sufficient in your mind? 21 A. I believe that the word independent was 22 left lower case for a reason in the 23 Triennial Review. And that's because it 24 did leave it to the parties to assess what 25 an independent auditor is.</p>	<p style="text-align: right;">Page 193</p> <p>1 Q. Do you know why KMC is requesting DSL 2 transport in this proceeding? 3 A. I believe that KMC's request is primarily 4 and, first of all, that KMC's customers -- 5 KMC's voice customers be allowed to 6 continue as BellSouth DSL customers in the 7 event that they should choose to do so. 8 Q. Does KMC have any voice customers today 9 who are receiving BellSouth FastAccess 10 DSL? 11 A. I am not sure, because for some long 12 period of time BellSouth would not allow 13 for KMC to -- for a customer to port its 14 service to KMC and continue to maintain 15 BellSouth's DSL service. 16 Q. Based upon the type of customer that you 17 are marketing to, do you believe that 18 those customers would have FastAccess 19 service for their internet service? 20 A. It's possible. 21 Q. What percentage of your customers retain 22 or obtain data services that are not 23 dedicated services? 24 A. I'm not sure as to the exact percentage. 25 Q. And does KMC offer a DSL product for its</p>
<p style="text-align: right;">Page 192</p> <p>1 Q. No, I'm asking you. Specifically in our 2 agreement, we agree that the auditor will 3 be AICPA compliant. 4 A. I believe that in and of itself is not 5 sufficient. 6 Q. So what additional safe guards would you 7 like to see in the language? 8 A. I haven't given it thought, but I'd like 9 to discuss it with the Joint Petitioners, 10 and perhaps we could work through it as, 11 you know, we continue to work through 12 issues with BellSouth. 13 MR. MEZA: Okay. Let us take a 14 break. 15 (RECESS.) 16 BY MR. MEZA: 17 Q. Ms. Johnson, what is your understanding of 18 DSL transport? 19 A. It's the transport portion of a DSL 20 circuit used to provide DSL services to a 21 switch. 22 Q. Can you explain to me how that would work? 23 A. No. 24 Q. Why not? 25 A. I'm not an engineer.</p>	<p style="text-align: right;">Page 194</p> <p>1 customers? 2 A. KMC does not offer a DSL product for its 3 customers. 4 Q. And has KMC amended its agreement in 5 either Florida, Georgia, or Kentucky 6 to -- and when I say "agreement", the 7 current agreement -- to allow for the 8 provision of BellSouth's FastAccess 9 service over UNE facilities? 10 A. Not that I am aware of. We were going to 11 include those provisions in our 12 replacement agreement. 13 Q. What's a replacement agreement? 14 A. The one that we're negotiating and 15 arbitrating now. 16 Q. To date, you have not though amended -- 17 A. To date. 18 Q. -- your current agreement? 19 Is it fair to say that KMC does 20 not include in its business plan the 21 provision of voice services without data 22 services? 23 A. No. 24 Q. It's not fair to say? 25 A. No.</p>

19 (Pages 191 to 194)

<p>Page 195</p> <p>1 Q. You have customers that retain solely 2 voice services with you? 3 A. Yes. 4 Q. And do you have customers that retain or 5 have data services with another company 6 while having voice services with you? 7 A. I am not certain. 8 Q. Does KMC offer bundles -- 9 A. Yes. 10 Q. -- that include voice service and data 11 services? 12 A. Yes. 13 Q. What is your understanding of the 14 marketing or the attractiveness of a 15 bundle for the consumer? 16 A. One-stop shopping. 17 Q. Are you aware if there are discounts 18 associated with services when they're 19 combined with a bundle? 20 A. Generally, yes. 21 Q. That when you price them out individually, 22 the services that are in the bundle, 23 they're generally more expensive? 24 A. Yes. 25 Q. And does KMC comport to that general price</p>	<p>Page 197</p> <p>1 make sure that I -- 2 Q. Sure. I want to make sure you're 3 absolutely clear. 4 A. The question's whether KMC's standalone 5 voice pricing to its customers is higher 6 than KMC's price for bundled data and 7 voice services? 8 Q. The voice component of the bundled 9 service. 10 A. I would not be able to compare those two 11 numbers because it's a bundled price, so I 12 would only be able to compare the 13 unbundled price to the bundled price. 14 Q. What if you -- What if -- Can you 15 compare the unbundled price of data and 16 the unbundled price of voice versus the 17 bundled price of data and voice? 18 A. Yes. 19 Q. And what is that? 20 A. I don't have those numbers with me, 21 but -- 22 Q. What is your -- 23 A. -- that would be -- 24 Q. What is your understanding of what that 25 result will likely be?</p>
<p>Page 196</p> <p>1 reduction for bundled services versus 2 standalone products? 3 A. It's likely. 4 Q. Do you know for sure? 5 A. I don't know for sure. I haven't compared 6 the pricing. 7 Q. In your opinion, do you think a KMC 8 customer, if it does want DSL or internet 9 service provided by another company that 10 the voice service, would be more or less 11 expensive if KMC also provided the data 12 service? 13 A. Your question presumes it's bundled, so 14 the services would be packaged as a 15 bundle. 16 Q. My question does not presume it's 17 bundled. My question is that, presume 18 that one of your customers has voice 19 service with you and data services with 20 another company. Do you believe that the 21 voice services that you are providing are 22 more expensive than the price it would be 23 if the customer was purchasing a bundle, a 24 voice-data bundle from KMC? 25 A. Do you mind if I restate your question to</p>	<p>Page 198</p> <p>1 A. The result would likely be that the 2 bundled pricing -- the two parts would be 3 greater than the bundled whole. 4 Q. So the bundle would be cheaper than the 5 standalone? 6 A. The bundle would be cheaper than the 7 purchase of two standalone purchases. 8 Q. Okay. What is your understanding of CNAM 9 dipping? 10 A. I don't believe that's my issue. 11 Q. No? Is it not? You're right. My 12 apologies. You're right. 13 Let's try again. Do you believe 14 that KMC is originating traffic that's 15 being terminated by an ICO? 16 A. Yes. 17 Q. Do you have any understanding as to the 18 volume of traffic that KMC is originating 19 and that is being terminated by an ICO? 20 A. Generally. 21 Q. And what is your understanding? 22 A. It's no more than maybe 10 percent of the 23 traffic that we exchange with BellSouth. 24 Q. Are ICOs currently billing KMC for 25 terminating their traffic?</p>

20 (Pages 195 to 198)

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<p>Page 199</p> <p>1 A. Some ICOs. 2 Q. Which one? 3 A. Sprint. 4 Q. Where? 5 A. I mean, throughout. I mean, we have 6 services throughout the United States. 7 Q. So you have interconnection agreements 8 with Sprint as an ICO? 9 A. Yes. 10 Q. And do you have interconnection agreements 11 with CenturyTel? 12 A. Right. 13 Q. Any other ICOs? 14 A. Valor. 15 Q. Any others? 16 A. Alltel. 17 Q. You have an interconnection agreement with 18 Valor and Alltel? 19 A. (Witness nods head up and down.) 20 Q. Any others? 21 A. Mid-Plains TDS. 22 Q. In BellSouth's region, I mean. 23 A. Oh, I'm sorry. 24 Q. Let me narrow it down. 25 A. I'm sorry.</p>	<p>Page 201</p> <p>1 Q. Okay. 2 A. It also varies. I mean, direct connect to 3 Sprint in some places but not in others or 4 Concord in some and not in others. The 5 traffic does not justify direct 6 connection. 7 Q. For those states in which you use 8 BellSouth's transiting function to get 9 your traffic to the ICO, does the 10 agreement that you have with the ICO 11 address those types of calls? 12 A. In the states where KMC has a traffic 13 exchange agreement with an ICO and traffic 14 between the parties is exchanged via 15 transit arrangement with BellSouth, does 16 our agreement address that transit 17 arrangement? 18 Q. Yes. 19 A. It does. 20 Q. Okay. And how does it address it? 21 A. We each take responsibility to pay 22 BellSouth for transiting services, 23 depending on whether we originate or 24 terminate the call. 25 Q. So if a KMC end user originates a call</p>
<p>Page 200</p> <p>1 Q. It's okay. 2 A. Concord Telephone. 3 Q. Any others? 4 A. There may be others, but I just cannot 5 remember them all offhand. 6 Q. In each of those ICOs, you have an 7 interconnection agreement with those ICOs; 8 is that correct?</p>	<p>Page 202</p> <p>1 that's terminated by Sprint ICO and the 2 call is transited to Sprint by BellSouth, 3 who would pay Sprint the charges 4 associated with terminating that call? 5 A. KMC would. 6 Q. And Sprint is able to identify calls that 7 you originate that are transited by 8 BellSouth?</p>

<p>Page 199</p> <p>1 A. Some ICOs. 2 Q. Which one? 3 A. Sprint. 4 Q. Where? 5 A. I mean, throughout. I mean, we have 6 services throughout the United States. 7 Q. So you have interconnection agreements 8 with Sprint as an ICO? 9 A. Yes. 10 Q. And do you have interconnection agreements 11 with CenturyTel? 12 A. Right. 13 Q. Any other ICOs? 14 A. Valor. 15 Q. Any others? 16 A. Alltel. 17 Q. You have an interconnection agreement with 18 Valor and Alltel? 19 A. (Witness nods head up and down.) 20 Q. Any others? 21 A. Mid-Plains TDS. 22 Q. In BellSouth's region, I mean. 23 A. Oh, I'm sorry. 24 Q. Let me narrow it down. 25 A. I'm sorry.</p>	<p>Page 201</p> <p>1 Q. Okay. 2 A. It also varies. I mean, direct connect to 3 Sprint in some places but not in others or 4 Concord in some and not in others. The 5 traffic does not justify direct 6 connection. 7 Q. For those states in which you use 8 BellSouth's transiting function to get 9 your traffic to the ICO, does the 10 agreement that you have with the ICO 11 address those types of calls? 12 A. In the states where KMC has a traffic 13 exchange agreement with an ICO and traffic 14 between the parties is exchanged via 15 transit arrangement with BellSouth, does 16 our agreement address that transit 17 arrangement? 18 Q. Yes. 19 A. It does. 20 Q. Okay. And how does it address it? 21 A. We each take responsibility to pay 22 BellSouth for transiting services, 23 depending on whether we originate or 24 terminate the call. 25 Q. So if a KMC end user originates a call</p>
<p>Page 200</p> <p>1 Q. It's okay. 2 A. Concord Telephone. 3 Q. Any others? 4 A. There may be others, but I just cannot 5 remember them all offhand. 6 Q. In each of those ICOs, you have an 7 interconnection agreement with those ICOs; 8 is that correct? 9 A. Traffic exchange agreement. 10 Q. And what's the difference between an 11 interconnection agreement and a traffic 12 exchange agreement? 13 A. The interconnection agreement offer 251 14 obligations for unbundling, collocation, 15 resale of services, pole attachments, and 16 other conditions. The traffic exchange 17 agreements only govern the interconnection 18 and exchange traffic obligations. It 19 would basically be the attachment 3 items. 20 Q. And are you interconnecting directly with 21 these ICOs, or are you -- or is BellSouth 22 transiting new traffic to these ICOs? 23 A. In some cases, we interconnect directly. 24 Q. And can you identify those? 25 A. Not offhand.</p>	<p>Page 202</p> <p>1 that's terminated by Sprint ICO and the 2 call is transited to Sprint by BellSouth, 3 who would pay Sprint the charters 4 associated with terminating that call? 5 A. KMC would. 6 Q. And Sprint is able to identify calls that 7 you originate that are transited by 8 BellSouth? 9 A. I am not sure whether Sprint can or 10 cannot. It varies by carrier. For 11 example, with Qwest, we use records 12 provided by Qwest to identify third 13 parties that we may have terminated 14 traffic to and to adjust the third-party 15 billing so we can do -- clean up the 16 balance between KMC and Qwest and then 17 work through billing arrangements with 18 those other carriers. So it varies by 19 carrier. 20 Q. Do you understand that, for the most part, 21 whether or not the ICO determines the 22 minutes of use that it terminates or does 23 the CLEC or KMC in this instance in -- 24 from the ICO that these are the minutes I 25 sent through BellSouth to you?</p>

<p style="text-align: right;">Page 207</p> <p>1 Commission over an intercarrier 2 compensation arrangement that were 3 probably over a decade old and were still 4 in force and BellSouth no longer wanted to 5 honor and be -- the crux of those 6 arrangements included intercarrier 7 compensation obligations that BellSouth 8 would have to these ICOs -- excuse me, 9 with regard to traffic terminated to other 10 third parties. 11 And I believe as well that there 12 was a settlement discussion as a way to 13 resolve this complaint raised as between 14 the ICOs and BellSouth, but the CLECs were 15 not a part of that settlement discussion, 16 and it would be difficult to bind the 17 CLECs to be obligated to pay either 18 BellSouth or the ICOs based on terms and 19 conditions that KMC -- that the CLECs 20 were not given an opportunity to provide 21 or receive consideration for. 22 So, you know, I think it would be 23 unreasonable to expect that the 24 commission's intent was to hold CLECs 25 accountable for settlement arrangements</p>	<p style="text-align: right;">Page 209</p> <p>1 Q. I think you misunderstood my question. I 2 asked you not whether direct connection is 3 the remedy, but whether billing 4 arrangements between the ICO and the CLEC 5 is the solution that should be achieved so 6 that BellSouth is not a party to your 7 billing each other. I mean, don't you 8 think that's a reasonable solution? 9 A. There's definitely a logic to that as an 10 option. It's fundamentally difficult to 11 implement because, again, you have to 12 negotiate multiple agreements with 13 carriers that we -- you know, so it would 14 take time to implement, but I think that's 15 one of the issues before the commission 16 now; and that is, should these 17 obligations -- should there be a 18 requirement for direct for these billing 19 arrangements to be established. 20 Q. And KMC, by the fact that they've entered 21 into several of them, it's pretty clear 22 that it is feasible; correct? 23 A. Yeah. But you'll note, as many as we 24 have, that we have over a hundred traffic 25 exchange agreements and interconnection</p>
<p style="text-align: right;">Page 208</p> <p>1 that were negotiated based on give and 2 take between ICOs and BellSouth and not 3 between ICOs, BellSouth, and the CLECs. 4 Q. Well, wouldn't this all -- wouldn't this 5 problem go entirely away if the ICOs and 6 the CLECs would just have a -- billing 7 arrangements between themselves as KMC does? 8 A. In a perfect world, it might be ideal to 9 have carriers direct connect, but the Act 10 provides for interconnection, direct and 11 indirect. And it's not truly practical to 12 interconnect with every carrier that you 13 may provide service -- you know, that you 14 may need to originate or terminate traffic 15 to. 16 It would be unfair to consumers 17 if, in order for KMC to provide 18 competitive service, I had to interconnect 19 with every single carrier in that local 20 calling area directly. That could cause 21 us to have to put up, you know, 22 interconnections to 60 different 23 carriers. That's why I believe BellSouth, 24 as the incumbent, plays a critical role as 25 a transit provider and --</p>	<p style="text-align: right;">Page 210</p> <p>1 agreements and I still don't have one with 2 everybody I exchange traffic with. 3 Q. You're not opposed to paying BellSouth 4 charges that it paid on your behalf for 5 getting a call from you to an ICO, are 6 you? 7 A. I'm not opposed to paying for services 8 that the ICO rendered to me by terminating 9 my traffic as long as I agree that those 10 were valid. My number, my customer made 11 the call, I agree. I have the opportunity 12 to review. 13 Q. And by the mere fact that ICO -- certain 14 ICOs and KMC are billing each other, even 15 when BellSouth performs the transit 16 function, wouldn't it be fair to say that 17 you have that ability to determine your 18 calls and minutes? 19 A. No. Actually, BellSouth -- that's one of 20 the reasons we have the true up process 21 with BellSouth today. BellSouth proceeds 22 us records in order to sort through that 23 ICO billing and third-party billing or 24 third-party traffic, because we don't 25 always know. We don't get adequate detail</p>

<p style="text-align: right;">Page 203</p> <p>1 A. Could you repeat the question?</p> <p>2 Q. Sure. In determining pursuant to your</p> <p>3 traffic exchange agreements the amounts</p> <p>4 that the ICO and KMC owe each other for</p> <p>5 terminating each other's traffic, is it</p> <p>6 the terminating carrier that determines</p> <p>7 the minutes of use that were terminated or</p> <p>8 the originating carrier determining the</p> <p>9 minutes of use that it sent to the carrier</p> <p>10 to be terminated?</p> <p>11 A. The terminating carrier determines the</p> <p>12 minutes of use it is due compensation for</p> <p>13 it.</p> <p>14 Q. Okay. Do you send bills to ICOs?</p> <p>15 A. We do.</p> <p>16 Q. Do you believe that BellSouth is paying</p> <p>17 ICOs for traffic that you originated but</p> <p>18 that the ICO is billing BellSouth because</p> <p>19 it doesn't know KMC was the originator of</p> <p>20 the call?</p> <p>21 A. That, I am not sure about. I know that in</p> <p>22 some arrangements, such as the primary</p> <p>23 toll provider arrangements, the law</p> <p>24 provides that BellSouth would be basically</p> <p>25 the billing intermediary between the ICO</p>	<p style="text-align: right;">Page 205</p> <p>1 those settlement discussions have involved</p> <p>2 intercarrier compensation obligations that</p> <p>3 would not bind BellSouth but would, in</p> <p>4 effect, bind the Joint Petitioners or</p> <p>5 other CLECs.</p> <p>6 So the request of the Joint</p> <p>7 Petitioners in the instant case is that</p> <p>8 they not be obligated to pay BellSouth for</p> <p>9 any amount that BellSouth has negotiated a</p> <p>10 settlement with another party and they</p> <p>11 weren't a party to that settlement. And</p> <p>12 that's, I think, a reasonable request.</p> <p>13 Also, to the extent that the --</p> <p>14 you know, again, the Joint Petitioners</p> <p>15 have indicated that -- just as with KMC's</p> <p>16 settlement, where the law requires and</p> <p>17 allows for BellSouth to bill, it requires</p> <p>18 the CLEC to pay as with primary toll</p> <p>19 provider arrangements, they've agreed they</p> <p>20 would pay BellSouth and BellSouth would</p> <p>21 pay them. And they're willing and</p> <p>22 agreeable to follow and comply with the</p> <p>23 law.</p> <p>24 The distinction, again, is they</p> <p>25 need an opportunity -- just as they would</p>
<p style="text-align: right;">Page 204</p> <p>1 and the CLEC.</p> <p>2 Q. And does -- in that instance, does KMC</p> <p>3 reimburse BellSouth for those charges</p> <p>4 imposed upon it by the ICO?</p> <p>5 A. In a recent agreement, KMC and BellSouth</p> <p>6 agreed that BellSouth would reimburse KMC</p> <p>7 and that KMC would reimburse BellSouth for</p> <p>8 those calls under primary toll provider</p> <p>9 arrangements.</p> <p>10 Q. So as far as KMC is concerned, is Issue 63</p> <p>11 still an issue in this arbitration?</p> <p>12 A. Yes. The reason that issue 63 continues</p> <p>13 to be an issue in the arbitration is,</p> <p>14 first and foremost, we're all Joint</p> <p>15 Petitioners. But the distinction between</p> <p>16 the request and this arbitration is --</p> <p>17 and the terms agreed in our settlement on</p> <p>18 the issue is that in this arbitration, the</p> <p>19 Joint Petitioners have asked that they</p> <p>20 have an opportunity to negotiate those</p> <p>21 services that they will pay for.</p> <p>22 And if I say it more clearly, the</p> <p>23 specific point is there have been</p> <p>24 instances where BellSouth and ICOs have</p> <p>25 participated in settlement discussions and</p>	<p style="text-align: right;">Page 206</p> <p>1 with BellSouth's direct billing to them,</p> <p>2 we need an opportunity to be able to audit</p> <p>3 and dispute and raise disputes on those</p> <p>4 bills.</p> <p>5 So if you look at the arrangement</p> <p>6 that KMC came to with BellSouth, it</p> <p>7 provides for that. We actually have in</p> <p>8 court in ORP for the billing for primary</p> <p>9 bill provider and for ORP between</p> <p>10 BellSouth and KMC. And I believe that the</p> <p>11 Joint Petitioners' request is asking, not</p> <p>12 in the exact same words, but for those</p> <p>13 same basic, fundamental principles, the</p> <p>14 right to only have to pay when the law</p> <p>15 requires that they pay; the right to be</p> <p>16 able to audit and raise disputes in a</p> <p>17 timely manner; and, also, the right to not</p> <p>18 be bound by terms and conditions in</p> <p>19 settlement agreements that they weren't a</p> <p>20 party to.</p> <p>21 Q. What settlement agreements are you</p> <p>22 referring to?</p> <p>23 A. As an example in Georgia, the ICOs and</p> <p>24 BellSouth were -- I think they've raised</p> <p>25 a complaint issue with the Georgia</p>

22 (Pages 203 to 206)

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1 Commission over an intercarrier
2 compensation arrangement that were
3 probably over a decade old and were still
4 in force and BellSouth no longer wanted to
5 honor and be -- the crux of those
6 arrangements included intercarrier
7 compensation obligations that BellSouth
8 would have to these ICOs -- excuse me,
9 with regard to traffic terminated to other
10 third parties.
11 And I believe as well that there
12 was a settlement discussion as a way to
13 resolve this complaint raised as between
14 the ICOs and BellSouth, but the CLECs were
15 not a part of that settlement discussion,
16 and it would be difficult to bind the
17 CLECs to be obligated to pay either
18 BellSouth or the ICOs based on terms and
19 conditions that KMC -- that the CLECs
20 were not given an opportunity to provide
21 or receive consideration for.
22 So, you know, I think it would be
23 unreasonable to expect that the
24 commission's intent was to hold CLECs
25 accountable for settlement arrangements

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1 that were negotiated based on give and
2 take between ICOs and BellSouth and not
3 between ICOs, BellSouth, and the CLECs.
4 Q. Well, wouldn't this all -- wouldn't this
5 problem go entirely away if the ICOs and
6 the CLECs would just have a -- billing
7 arrangements between themselves as KMC does?
8 A. In a perfect world, it might be ideal to
9 have carriers direct connect, but the Act
10 provides for interconnection, direct and
11 indirect. And it's not truly practical to
12 interconnect with every carrier that you
13 may provide service -- you know, that you
14 may need to originate or terminate traffic
15 to.
16 It would be unfair to consumers
17 if, in order for KMC to provide
18 competitive service, I had to interconnect
19 with every single carrier in that local
20 calling area directly. That could cause
21 us to have to put up, you know,
22 interconnections to 60 different
23 carriers. That's why I believe BellSouth,
24 as the incumbent, plays a critical role as
25 a transit provider and --

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1 Q. I think you misunderstood my question. I
2 asked you not whether direct connection is
3 the remedy, but whether billing
4 arrangements between the ICO and the CLEC
5 is the solution that should be achieved so
6 that BellSouth is not a party to your
7 billing each other. I mean, don't you
8 think that's a reasonable solution?
9 A. There's definitely a logic to that as an
10 option. It's fundamentally difficult to
11 implement because, again, you have to
12 negotiate multiple agreements with
13 carriers that we -- you know, so it would
14 take time to implement, but I think that's
15 one of the issues before the commission
16 now; and that is, should these
17 obligations -- should there be a
18 requirement for direct for these billing
19 arrangements to be established.
20 Q. And KMC, by the fact that they've entered
21 into several of them, it's pretty clear
22 that it is feasible; correct?
23 A. Yeah. But you'll note, as many as we
24 have, that we have over a hundred traffic
25 exchange agreements and interconnection

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1 agreements and I still don't have one with
2 everybody I exchange traffic with.
3 Q. You're not opposed to paying BellSouth
4 charges that it paid on your behalf for
5 getting a call from you to an ICO, are
6 you?
7 A. I'm not opposed to paying for services
8 that the ICO rendered to me by terminating
9 my traffic as long as I agree that those
10 were valid. My number, my customer made
11 the call, I agree. I have the opportunity
12 to review.
13 Q. And by the mere fact that ICO -- certain
14 ICOs and KMC are billing each other, even
15 when BellSouth performs the transit
16 function, wouldn't it be fair to say that
17 you have that ability to determine your
18 calls and minutes?
19 A. No. Actually, BellSouth -- that's one of
20 the reasons we have the true up process
21 with BellSouth today. BellSouth proceeds
22 us records in order to sort through that
23 ICO billing and third-party billing or
24 third-party traffic, because we don't
25 always know. We don't get adequate detail

<p>Page 211</p> <p>1 to determine, so we work with BellSouth, 2 and that's one of the things we agreed to 3 in our settlement. 4 Q. Is KMC attempting to change the terms of 5 the settlement as it relates to this new 6 agreement? 7 A. No. KMC agreed in the settlement to 8 implement those terms in the new 9 agreement. 10 Q. So I guess I'm confused. If that's the 11 case, why isn't this issue settled with 12 KMC? 13 A. See, remember, the issue is resolved as it 14 relates to KMC on a fundamental basis. 15 We've agreed, through the result of 16 compromise in our settlement agreement, 17 that in primary toll provider and ORP 18 states, we would reach billing 19 arrangements that are not substantially 20 different than the billing arrangements 21 requested by the Joint Petitioners here. 22 The fundamental issue that the Joint 23 Petitioners have asked for is that it not 24 be obligated to pay any amounts that 25 result in -- that are the result of a</p>	<p>Page 213</p> <p>1 A. ICO traffic, specifically. 2 Q. ICO traffic. 3 A. Primary toll provider traffic and ORP 4 traffic. 5 Q. And you don't view continuing to litigate 6 this issue as a means to add terms to a 7 settlement agreement? 8 A. No. Like I said, if there were provisions 9 that resulted -- as a result of this 10 arbitration that conflicted with the terms 11 of those settlement agreements -- with 12 the terms of the settlement agreement, we 13 wouldn't be subject to them. 14 We wouldn't -- For example, the 15 Joint Petitioners have agreed to pay 16 BellSouth where the law requires them to. 17 We've been a bit more specific in our 18 settlement agreement. We've agreed to pay 19 BellSouth for -- in instances of primary 20 toll provider arrangement set forth based 21 on the specific terms and on ORP 22 arrangements based on specific terms. 23 Now, if the result of this 24 arbitration said that, oh, actually Joint 25 Petitioners changed their position, they</p>
<p>Page 212</p> <p>1 settlement agreement. 2 Q. So it's your opinion you're not changing 3 the terms of the settlement agreement you 4 reached with BellSouth by continuing to 5 litigate, as far as KMC goes, this issue 6 is in this arbitration? 7 A. No. 8 Q. Is it your opinion that if you obtain a 9 ruling in this proceeding that it would 10 apply in addition to that which the 11 parties agreed to? 12 A. To the extent it didn't conflict with what 13 we've agreed to, it would apply. 14 Q. Was it your understanding that BellSouth 15 agreed to implement -- or agreed to this 16 settlement agreement such that additional 17 terms could be raised or made applicable 18 to it pursuant to this arbitration 19 proceeding? 20 A. We didn't settle all of attachment 3. We 21 settled specific issues. 22 Q. And one of the issues you settled was how 23 the parties would handle traffic transit 24 to -- by BellSouth to a third party 25 originated by KMC?</p>	<p>Page 214</p> <p>1 don't even want to pay BellSouth for 2 third-party traffic, they believe that, 3 you know, BellSouth should pay and they 4 shouldn't have to pay any amounts to 5 BellSouth on behalf of third parties, that 6 would not apply to KMC. KMC's already 7 explicitly agreed to pay BellSouth and 8 BellSouth to pay KMC and primary toll 9 provider and ORP arrangement. 10 Now, we didn't address whether or 11 not if BellSouth went and settled 12 something in a settlement agreement with 13 an ICO, whether or not KMC would be 14 subject to having to pay BellSouth amounts 15 under settlement agreements. So if the 16 result of this arbitration is that, under 17 a settlement agreement, it could not bind 18 the Joint Petitioners to having to pay 19 BellSouth to terms under BellSouth's 20 settlement agreement with third parties, 21 that was not one of the issues addressed 22 in our settlement. 23 Q. Today, are you aware of any settlements 24 that BellSouth has with ICOs? 25 A. I am not sure as to whether the terms of</p>

24 (Pages 211 to 214)

<p style="text-align: right;">Page 215</p> <p>1 the Georgia ICO arrangement are considered 2 settlement agreement or contracts. I 3 think they're considered contracts at this 4 point, but I know that there is a 5 possibility that, as a result of the 6 litigation that's going on between 7 BellSouth and the ICOs, that there could 8 be a settlement arrangement between 9 BellSouth and the ICOs. 10 Q. Are you aware of any other settlement? 11 A. No. I'm sure though that, just as the 12 Georgia ICOs have raised the concerns with 13 these contracts with BellSouth, other ICOs 14 in Louisiana or South Carolina may 15 similarly raise concerns. Some of the 16 ICOs in Georgia may also operate in those 17 other states. 18 Q. Today, if there are settlements, your 19 agreement with BellSouth, does it address 20 or does it segregate minutes terminated 21 pursuant to a settlement versus any other 22 types of minutes? 23 A. Actually, what it specifically talks to is 24 minutes under the primary toll provider 25 arrangement and under the ORP</p>	<p style="text-align: right;">Page 217</p> <p>1 extent that it's not set forth in the 2 applicable law as the primary toll 3 provider plan and the ORP plan is to have 4 to pay BellSouth under a settlement 5 arrangement. 6 The other difference between the 7 Joint Petitioners' request and the 8 settlement agreement that KMC reached with 9 BellSouth is they want a bit more 10 discipline dispute process. We've agreed 11 to a true up process that works for each 12 of our companies to do, this purportedly 13 true up, and that's acceptable to KMC. 14 The Joint Petitioners have requested that 15 they have an opportunity to have a more 16 specific dispute process. 17 Q. And do you know what that specific dispute 18 process is? 19 A. Yes. It's set forth in the testimony. 20 Q. Do you agree with me that a settlement 21 agreement is a contract? 22 A. I do. 23 Q. Your favorite subject, the TIC. What is 24 your understanding of what a TIC is? 25 A. My understanding is that a TIC is the</p>
<p style="text-align: right;">Page 216</p> <p>1 arrangement. Those are not settlement 2 agreements, in my mind. Those are legal 3 obligations to pay ICOs, you know, so I 4 think that the agreement clearly purports 5 to support the law. We will agree to pay 6 BellSouth and BellSouth will pay us 7 consistent with applicable law under 8 primary toll provider arrangements and ORP 9 arrangements. 10 Q. Why hasn't KMC described this settlement 11 in its testimony? 12 A. It's the settlement actually that 13 integrated into our interconnection 14 agreement, so I didn't see a need to 15 extrapolate the settlement in our 16 testimony. 17 Q. Are the Joint Petitioners willing to 18 accept the terms that KMC has entered into 19 with BellSouth to resolve this issue? 20 A. I think the Joint Petitioners believe that 21 the terms they've asked for are very 22 similar in many regards to the terms KMC 23 have settled on with that one exception 24 that I keep bringing, and that is they 25 don't want an additional burden to the</p>	<p style="text-align: right;">Page 218</p> <p>1 market-based rate that BellSouth assesses 2 in addition to its tandem switching and 3 common transport transit charges to calls 4 that it terminates to third parties on 5 behalf of another party, another carrier. 6 Q. So can you describe how it works in the 7 call forward? 8 A. As an example, if KMC originated a call 9 that was destined for an end user of NuVox 10 and KMC and NuVox were not direct 11 connected and they utilized BellSouth's 12 transit service, KMC would send this call 13 to BellSouth's tandem. BellSouth would 14 bill to KMC a tandem switching and common 15 transport rate element on a permit of use 16 basis associated with transiting that 17 call. BellSouth would send that call to 18 NuVox for ultimate termination; and in 19 addition to the transit switch -- the 20 tandem switching and common transport 21 charge already assessed, BellSouth would 22 assess this tandem intermediary charge, 23 this TIC charge, as an additive for 24 providing transiting function. 25 Q. Why do you believe that services -- or</p>

25 (Pages 215 to 218)

<p>Page 219</p> <p>1 that the transit intermediary charge 2 should be priced at TELRIC? 3 A. Because it's an interconnection function. 4 Q. Do you believe that BellSouth is obligated 5 to -- under the Act to transit your 6 traffic to another CLEC or another 7 carrier? 8 A. Well, I believe that that issue is not an 9 issue in this arbitration because 10 BellSouth has agreed, as it's done for the 11 last eight years, to provide a tandem 12 transit function. 13 Q. So your answer to my question would be 14 yes? 15 A. Yes. 16 Q. Do you believe that BellSouth has a 251 17 obligation to transit your traffic to 18 another carrier? 19 A. Yes, and I know BellSouth may dispute 20 that. That is an issue, again, before the 21 Georgia Public Service Commission in the 22 transit docket. 23 Q. So is the TIC at issue in this arbitration 24 at issue in Georgia? 25 A. Because CLECs were not included in the</p>	<p>Page 221</p> <p>1 Q. Do you know what that company does? 2 A. They purport to provide tandem transiting 3 functions. 4 Q. Which is the same function BellSouth is 5 providing to KMC? 6 A. Correct. 7 Q. Do you know what Neutral Tandem charges? 8 A. I don't know for sure, but my recollection 9 is that it's free. 10 Q. So what do you pay for or how does Neutral 11 Tandem make money? 12 A. I don't recall. 13 Q. Why do you believe it's free? And what 14 are you referring is free? 15 A. That there's no tandem intermediary 16 charge, that they may charge a basic 17 origination or termination charge. 18 Q. So there's -- they don't have a charge 19 that's similar to the TIC. They've given 20 you a composite charge or they have a 21 composite charge; is that right? 22 A. I really can't say. I'm only vaguely 23 familiar with it. 24 Q. And how did you find out about Neutral 25 Tandem?</p>
<p>Page 220</p> <p>1 initial docket, we were specifically 2 allowed to participate in the workshops 3 but were not a party and the proceeding 4 has not yet been expanded, the TIC was one 5 of the issues that we presented as a CLEC 6 issue. So as soon as CLECs participate 7 fully in the docket, it is. 8 Q. Is it possible for KMC to avoid connecting 9 -- or using BellSouth's transit function 10 by directly connecting with another 11 carrier? 12 A. Possible, but not practical. 13 Q. KMC has, in fact, done that though in some 14 circumstances? 15 A. Where practical. 16 Q. Do you know if other carriers or companies 17 provide this transiting function? 18 A. Do I know of any carrier specifically? 19 Q. Yep. 20 A. Non-ILEC carrier? 21 Q. Yes. 22 A. I've heard of a company called Neutral 23 Tandem Services. 24 Q. Does KMC use that company? 25 A. No.</p>	<p>Page 222</p> <p>1 A. One of our salespeople said there's a 2 company called Neutral Tandem Services, we 3 should look into the opportunities that 4 they describe. 5 Q. As an alternative to using BellSouth's 6 transit functions? 7 A. No, as a business opportunity for KMC. 8 Q. To buy? 9 A. No, to provide the service ourselves. 10 Q. Oh. Let's talk about supplemental 11 issues. Do you agree with me there may be 12 certain provisions in the FCC's final 13 rules that are clear and unambiguous? 14 A. There might be. 15 Q. For instance, ILECs have no obligation to 16 provide competitive LECs with unbundled 17 access to mass market local circuit 18 switching, do you consider that sentence 19 to be clear and unambiguous? 20 MR. CAMPEN: Objection to form of 21 the question. 22 A. What was -- Where was that sentence taken 23 from again? 24 Q. We'll mark it as an exhibit. 25 (DEPOSITION EXHIBIT NO. 27 WAS MARKED.)</p>

26 (Pages 219 to 222)

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1 Q. Showing you the FCC press release,
2 December 15th, 2004. I'd like for you to
3 look on the last bullet, first sentence
4 regarding mass market local circuit
5 switching.
6 A. Okay.
7 Q. All right. And I understand there are no
8 rules out, and I believe you are of the
9 same opinion; is that correct?
10 A. There are no rules out, correct.
11 Q. Presume with me that the rule said,
12 relating to mass market switching, exactly
13 what it says on the first line of that
14 bullet, ILECs -- ILECs have no obligation
15 to provide competitive LECs with unbundled
16 access to mass market local circuit
17 switching. Do you agree with me that that
18 finding is clear and unambiguous?
19 MR. CAMPEN: Objection to the
20 form.
21 A. The finding -- This sentence does not
22 represent the FCC's entire finding,
23 though.
24 Q. Okay.
25 A. So this sentence is a clear sentence.

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1 However, without reading further, you
2 don't understand how the FCC intends to
3 implement that finding.
4 Q. I'm not asking you how -- Are you talking
5 about the transition aspect of it?
6 A. Correct.
7 Q. That wasn't my question.
8 A. Oh.
9 Q. I'll asking you whether -- should there
10 be a dispute -- If the FCC makes that same
11 exact statement in its final rules, should
12 there be a dispute as to whether ILECs
13 have an obligation to provide competitive
14 LECs with unbundled access to mass market
15 local circuit switching?
16 A. If the final rules include this sentence,
17 incumbent LECs have no obligation to
18 provide competitive LECs with unbundled
19 access to mass market local circuit
20 switching, there should -- it should be
21 clear that under Section 251 of the Act,
22 there is no such obligation.
23 Q. Okay. Do you see any reason to negotiate
24 a provision as clear as what you've just
25 stated?

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1 A. Yes.
2 Q. Why?
3 A. Because our current interconnection
4 agreement and the draft interconnection
5 agreement that we are working from don't
6 have this clear a sentence in them, so we
7 would negotiate in order to integrate that
8 language into our agreement.
9 Q. What negotiation would be required or what
10 is the extent of negotiation that would be
11 required to implement that clear sentence
12 into your agreement?
13 A. To implement it into my agreement, it
14 would require that we, first, integrate
15 the language.
16 Q. Uh-huh.
17 A. And I know this sentence looks simple,
18 but, as an example, the rule on what line
19 conditioning is looks simple to KMC and I
20 think it's as simple as taking the
21 language from 51 -- I think it was 309 or
22 whatever, but -- and putting it in the
23 attachments on UNEs. And I would imagine
24 we'd start similarly here. We'd take this
25 language verbatim from the order and we

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1 would integrate it -- and just so it's on
2 the same page in the UNEs, then would
3 strike any other provision that was in
4 conflict with this. And then we'd also
5 have to integrate also the transition
6 period language into the agreement so that
7 we -- because we know we have services in
8 place today, properly account for that.
9 What we might want to also do, because the
10 contract is specific to BellSouth and to
11 KMC, is include a date certain that the
12 transition period will end. Because at
13 that point, we should have more clarity on
14 the exact dates regarding the transition
15 and we should be able to say for certain
16 what -- that time frame, when it ends and
17 when it begins.
18 And we put all that language into
19 our UNE attachment so that when our
20 operations people pick up our
21 interconnection agreements and try to
22 figure out if they can order mass market
23 switching elements, it's absolutely
24 clear. It would say no unless it's
25 between these two time frames.

<p>Page 227</p> <p>1 Q. And you believe that involves negotiation 2 rather than simply implementation of the 3 order into the agreement? 4 A. Indeed it does. And, remember, part 5 of -- I would have thought, for example, 6 that the Triennial Review integration 7 prior to the USTA II decision could have 8 been easier. But as you'll see from this 9 arbitration, we're having disagreements on 10 things that we consider simple; for 11 example, the EELs provisions use the term 12 customer. BellSouth proposed that we 13 supplement rule and use the term end 14 user. 15 I think it should be simple 16 enough, but we won't know until we 17 actually integrate the language whether or 18 not we both agree that the rule says what 19 it says. 20 Q. Do you think that the FCC intended for 21 their rules -- for the new rules that 22 they're going to set forth soon to be 23 subject to delay regarding their 24 implementation? 25 A. I believe that the FCC is going to likely</p>	<p>Page 229</p> <p>1 in that regard. So, yes, I believe the 2 FCC expects that we will work efficiently 3 to implement any rule or order they issue. 4 Q. Do you believe that the FCC stated in the 5 Interim Rules Order that it wanted or 6 intended for its final rules to take 7 effect quickly? 8 A. I don't recall whether or not that 9 statement specifically was in the order. 10 MR. MEZA: Next exhibit, please. 11 (DEPOSITION EXHIBIT NO. 28 WAS MARKED.) 12 Q. Showing you Exhibit 28, which is the 13 showing -- which is the Interim Rules 14 Order issued by the FCC. 15 (PAUSE.) 16 A. Okay. 17 Q. Do you see the last sentence of paragraph 18 23? 19 (PAUSE.) 20 A. I do. 21 Q. And the preceding sentence, if you could 22 read that, as well? 23 (PAUSE.) 24 A. Yes. 25 Q. Do you agree with me that the FCC, in the</p>
<p>Page 228</p> <p>1 set a transition period and they are going 2 to set their expectation at that point as 3 well for the effective dates of the 4 order. I believe the FCC also knows that 5 it cannot generally supersede contracts 6 and that the effectiveness of its order is 7 going to require implementation in each of 8 the contracts. 9 Q. Do you think that the FCC in the Interim 10 Rules Order indicated that it wanted there 11 to be a speedy or a not time-consuming 12 process in order to implement its 13 decision? 14 MR. CAMPEN: Objection to the form 15 of the question. 16 A. I believe that the FCC expressed specific 17 concerns with the timeliness of 18 implementation of its Triennial Review and 19 its UNE unbundling obligations, but I 20 believe the FCC always expects timely 21 implementation of every order. 22 For example, the recent decision 23 to forbear on the ISP order on remand. 24 I'm sure the FCC similarly expects timely 25 implementation and compliance with the law</p>	<p>Page 230</p> <p>1 sentences I've asked you to read, lay down 2 groundwork for implementing its changes 3 that it required or established in the 4 Interim Rules Order as well as what it may 5 require in the final unbundling -- final 6 rules so that they could take effect 7 quickly? 8 A. I believe that the FCC's expectations 9 regarding such implementation are set 10 forth in paragraph 23 but not in the two 11 sentences you asked that I read. I 12 believe it's actually set forth in the 13 sentence immediately preceding that. 14 Q. The Interim approach adopted here, in 15 contrast, does not enable competing 16 carriers to do either, is that the 17 sentence you're referring to? 18 A. Oh, I'm sorry. Hold on. No. I believe 19 it is set forth in the first sentence that 20 you asked that I read, the one that starts 21 further, as described above. 22 Q. Yeah. You would agree with me that in 23 this sentence, the FCC is saying that 24 ILECs can initiate change in law 25 proceedings and presume that there is no</p>

<p style="text-align: right;">Page 231</p> <p>1 requirement to unbundle switching 2 enterprise market loops and dedicated 3 transport; is that right? 4 A. So long as they reflect the transition 5 regime set forth below, and provided that 6 they continue to comply with the interim 7 approach set forth. 8 Q. And the FCC concludes by stating that, if 9 you do this, then whatever alterations are 10 approved or deemed approved by the 11 relevant state commissions may take effect 12 quickly if the final rules, in fact, to 13 decline unbundling obligations for 14 switching enterprise market loops and 15 dedicated transport. Do you agree with 16 that? 17 A. I -- Let me restate what I think you 18 said. 19 Q. Okay. 20 A. And then if you agree with my 21 restatement -- 22 Q. Okay. 23 A. -- I'll confirm I agree with your 24 statement. What I think you said is that 25 the FCC indicated that, to the extent the</p>	<p style="text-align: right;">Page 233</p> <p>1 effect quickly, in my mind, when I 2 negotiate with another carrier a change to 3 our agreement, we submit those changes to 4 the commission for approval as an 5 amendment to our interconnection 6 agreement. So the commission would 7 approve or by operation of law that would 8 be deemed approved in some cases if the 9 commission does not approve them within 10 the statutory time frame. Therefore, when 11 the commission issued final rules 12 consistent with the terms of those 13 agreements, they would be in effect. It 14 would -- All of the negotiations to 15 implement those terms into the contracts, 16 the state approval of those amendments and 17 then the ultimate resolution regarding the 18 final rules would all have been 19 negotiated; therefore, we wouldn't be 20 starting all over from scratch to start 21 negotiating what the -- and how to 22 implement those rules into our 23 agreements. 24 So, in my mind, the purpose of 25 this paragraph was to say, you guys can</p>
<p style="text-align: right;">Page 232</p> <p>1 parties go ahead and negotiate the change 2 in law provision that presume the absence 3 of certain unbundling obligations and then 4 there is later a finding that certain -- 5 that those unbundling obligations, in 6 fact, do not exist, then when we issue 7 those final rules that, in fact, say that 8 those unbundling obligations do not exist, 9 that will -- the fact that the carriers 10 had already negotiated those terms 11 presuming the absence of unbundling will 12 allow for speedy implementation. 13 Q. So you're interpreting change of law -- 14 initiating change of law proceedings to 15 encompass negotiations? 16 A. In fact, yes, my agreement provides for 17 negotiation in change in law. 18 Q. And you would also agree with me that in 19 the last sentence the FCC states that 20 alterations can be approved or deemed 21 approved by relevant state commissions? 22 A. Just to be clear, my read on the sentence 23 that says, thus, whatever alterations are 24 approved are deemed to be approved by the 25 relevant state commissions and may take</p>	<p style="text-align: right;">Page 234</p> <p>1 get a jump start on the process by going 2 ahead and negotiating any change in law 3 obligations that you have. Go ahead, as 4 you would normally do, submit those 5 amendments to the commission. The 6 commissions can approve them and, 7 therefore, when I issue final unbundling 8 -- or final rules, if the rules indeed 9 say there's no obligation to unbundle mass 10 market switching and your contract had so 11 been amended, then your contract's ready 12 to go. You can proceed and operate in an 13 expeditious manner. 14 Q. Would you agree with me that change of law 15 proceedings also involve dispute 16 resolution? 17 A. They do. 18 Q. Is there any prohibition from the final 19 rules going to effect upon their issuance 20 and the parties still negotiating after 21 their effectiveness? 22 A. No. 23 Q. Is it your position that, while the 24 parties are negotiating the final rules, 25 those rules would not be applicable to</p>

<p>Page 235</p> <p>1 KMC?</p> <p>2 A. It depends on the terms of your individual</p> <p>3 contract. Some contracts provide that</p> <p>4 change in law is effective immediately.</p> <p>5 Some contracts provide that change in law</p> <p>6 is effective upon amendment to the</p> <p>7 agreement. Some contracts provide that</p> <p>8 change in law is effective after a</p> <p>9 reasonable negotiation period. And if no</p> <p>10 agreement is reached, maybe like 60 to 90</p> <p>11 days, then it goes to dispute resolution.</p> <p>12 But either way, the resolution is</p> <p>13 effective as of the 90-day period. So it</p> <p>14 depends on the contract. I believe in</p> <p>15 this context, we've agreed that there</p> <p>16 would not be an impact because as a result</p> <p>17 of our abeyance is -- we would continue to</p> <p>18 negotiate implementation of the final</p> <p>19 rules.</p> <p>20 Q. And --</p> <p>21 A. Prospectively.</p> <p>22 Q. Do you believe that agreement encompassed</p> <p>23 the final rules?</p> <p>24 A. I don't recall specifically and I don't</p> <p>25 have the actual abeyance or any</p>	<p>Page 237</p> <p>1 Q. Does --</p> <p>2 A. But I don't recall specifically.</p> <p>3 Q. Did BellSouth send you an Interim Rules</p> <p>4 Order amendment?</p> <p>5 A. I don't recall.</p> <p>6 Q. Is it your opinion there was an agreement</p> <p>7 between the parties not to invoke change</p> <p>8 of law for the TRO?</p> <p>9 A. When you say "the TRO", to me the TRO is</p> <p>10 the order that was issued, the USTA II</p> <p>11 decision and then the final -- then the</p> <p>12 remand.</p> <p>13 Q. Okay.</p> <p>14 A. So --.</p> <p>15 Q. That's not my same understanding.</p> <p>16 A. That, to me, is the TRO.</p> <p>17 Q. The August 2003 order.</p> <p>18 A. I don't know that our agreement was</p> <p>19 limited to the August 2003 order.</p> <p>20 Q. I'm asking, do you know when that order</p> <p>21 came out if the parties had an agreement</p> <p>22 not to invoke change of law to implement</p> <p>23 that decision?</p> <p>24 A. I believe, in fact, that we specifically</p> <p>25 negotiated to integrate the August 2003</p>
<p>Page 236</p> <p>1 correspondence between John Heitmann and</p> <p>2 Rona Reynolds or yourself on that matter</p> <p>3 in front of me.</p> <p>4 Q. Do you believe that you can add</p> <p>5 arbitration issues -- new arbitration</p> <p>6 issues after submitting the issues to the</p> <p>7 commission in a petition?</p> <p>8 A. I think we did, in fact, in this</p> <p>9 instance. We presented supplemental</p> <p>10 issues.</p> <p>11 Q. Absent a request for relief to do that, do</p> <p>12 you think that is allowable?</p> <p>13 A. Absent a request and permission to do so,</p> <p>14 I don't think it should be allowable.</p> <p>15 Q. Do you know if BellSouth sent you a TRO</p> <p>16 change of law letter?</p> <p>17 A. I believe that BellSouth sent it and</p> <p>18 retracted it, because we were negotiating</p> <p>19 and they knew that we had a special</p> <p>20 agreement or a specific agreement that</p> <p>21 provided otherwise.</p> <p>22 Q. For the TRO?</p> <p>23 A. For the TRO.</p> <p>24 Q. What about the vacatur amendment?</p> <p>25 A. I think the same on the vacatur.</p>	<p>Page 238</p> <p>1 TRO, and then the USTA II decision came</p> <p>2 out, and that's when things got confusing.</p> <p>3 Q. Are the parties still negotiating today?</p> <p>4 A. We are.</p> <p>5 Q. Do you believe that any provisions of the</p> <p>6 August 23, 2003, TRO is self-effectuating?</p> <p>7 A. I believe that there are none that are</p> <p>8 self-effectuating. But I would say with</p> <p>9 regard to routine network modifications,</p> <p>10 the commission made it a point to note</p> <p>11 that -- you know, that their rules hadn't</p> <p>12 changed. They were just confirming,</p> <p>13 again, that they believed this obligation</p> <p>14 always existed. So it's not -- in that</p> <p>15 instance, it wasn't self-effectuating.</p> <p>16 They were just affirming that this was a</p> <p>17 rule all along. So I believe that the</p> <p>18 order itself requires negotiation as a</p> <p>19 change in law and integration into</p> <p>20 agreements.</p> <p>21 Q. Do you think any provision of the FCC</p> <p>22 final rules are self -- or could be</p> <p>23 self-effectuating?</p> <p>24 MR. CAMPEN: Objection to the form</p> <p>25 of the question.</p>

30 (Pages 235 to 238)

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1 A. No.
2 Q. So in no instance can the FCC, in your
3 mind, say that regardless of what your
4 change in law obligations are, these rules
5 go into effect upon their issuance in the
6 federal registry?
7 A. I misunderstood your question.
8 Q. Okay.
9 A. Were you asking me -- Could you repeat
10 your question?
11 Q. Sure. Do you believe that the FCC can
12 state that their rules are
13 self-effectuating, meaning that there does
14 not need to be a change of law process to
15 implement them?
16 A. I think that's a legal issue that I don't
17 have an ultimate conclusion regarding. I
18 believe that even if the FCC did do that,
19 their intent would be to make the
20 effective date binding, but they couldn't
21 be as naive to think that it would be
22 self-effectuating, meaning that we could
23 read the order and everybody knows how to
24 run their business moving forward and not
25 need to reduce that to contract language.

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1 That would be shortsighted.
2 Q. Do you have an objection -- and I know
3 this is all speculative because we don't
4 know what the order is going to say, but
5 as it stands today, is it your opinion
6 that the terms and conditions and rules
7 relating to BellSouth's obligation to
8 provide certain services to you would be
9 retroactive to the date, would apply
10 retroactively to the date that the
11 commission's order came out to allow the
12 parties to negotiate those terms, rates,
13 and conditions into their interconnection
14 agreement, but not to penalize either
15 party for the delay in the implementation
16 of those rates, terms, and conditions?
17 MR. CAMPEN: Objection to the form
18 of the question.
19 A. That was a very long question, Mr. Meza.
20 Q. Okay. Do you believe that there could be
21 retroactive applications of the rates,
22 terms, and conditions set forth in the
23 FCC's final rules?
24 A. There are instances that could yield
25 retroactive application. Are you asking

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1 whether or not I believe the current
2 agreement between KMC and BellSouth
3 provides for it?
4 Q. Yeah, that's what I'm asking you.
5 A. Retroactive application?
6 Q. Do you know?
7 A. I do not know because, like I said, there
8 was, as I understand it, language included
9 in the abeyance as well as an
10 understanding between John Heitmann, Rona,
11 and yourself with regard to the
12 effectiveness and the retroactive
13 applications in the Interim Rules and an
14 agreement to work prospectively to
15 integrate those rules.
16 Q. Do you know if BellSouth agrees with that
17 characterization of the agreement?
18 A. Do you?
19 Q. No. Do you know if state commissions in
20 the past have ordered rates that they
21 impose upon the parties to be applied from
22 the day of the order?
23 A. In fact, the FCC's ISP decision to forbear
24 and the ISP order on remand set an
25 effective date of October 8th, though the

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1 FCC did not in its order purport to
2 supersede contract provisions and change
3 in law processes.
4 Q. Do you know if any state commission has
5 ordered that rates would be applied
6 regardless of when they're implemented to
7 the agreement to the date upon which the
8 order was issued?
9 A. I cannot recall where an order has
10 purported to supersede the -- to overrule
11 the change in law provisions in terms of
12 effectiveness.
13 Q. Do you agree that the FCC final rules may
14 be less favorable than the current rules
15 that BellSouth is obligated to provide
16 KMC?
17 A. When you say "current rules", do you mean
18 the interim rules?
19 Q. Yes.
20 A. I only have the press release.
21 Q. And it is sort of speculative?
22 A. Yes.
23 Q. Okay. I'll retract that question.
24 Are the Interim Rules, based upon
25 your understanding of what the transition

<p style="text-align: right;">Page 243</p> <p>1 period required in the Interim Rules 2 Order, more or less favorable than the 3 rules that existed prior to the Interim 4 Rules Order? 5 A. The Interim Rules are less favorable than 6 the rules that existed prior to the 7 Interim Rules. 8 Q. As far as KMC is concerned? 9 A. As far as KMC is concerned. 10 Q. Do you believe that KMC has an incentive 11 to implement the FCC's final rules as 12 expeditiously as possible? 13 A. We do. 14 Q. And what incentive is that? 15 A. To provide certainty to our investors and 16 our consumers. And, you know, the 17 question I kept asking the commission in 18 my lobby is, what do my sales team -- 19 what basis do my sales guys use to quote 20 rates to my customers to bring certainty 21 to our terms and conditions, is an 22 ultimate objective that I have to deliver 23 for the business as soon as possible. 24 Q. Well, will KMC commit to expeditious 25 negotiation of the FCC final rules?</p>	<p style="text-align: right;">Page 245</p> <p>1 law, you have to continue to provide mass 2 market unbundled local switching, do you 3 think that state ruling would be 4 appropriate? 5 MR. CAMPEN: Objection to form of 6 the question. 7 A. Yes, to reconcile from a theoretical 8 perspective as to why that conflict with 9 the federal rule, I would imagine that in 10 theory the federal rule says there's no 11 federal unbundling obligation. But to the 12 extent that the state even had the right 13 to order unbundling, I'm presuming that it 14 didn't conflict with the federal rights, 15 the federal rules. 16 Q. Are you aware of a doctrine called the 17 factio preemption? 18 A. Vaguely, I remember it from some 19 second-year law. 20 Q. Do you think it is permissible for a state 21 to order a company to do an act that the 22 federal government has said you are no 23 longer obligated to do and still not be in 24 conflict with the federal decision? 25 A. It depends on the scope of the federal.</p>
<p style="text-align: right;">Page 244</p> <p>1 A. Most certainly. 2 Q. And implementation of those rules? 3 A. Most certainly. 4 Q. Is it your understanding that a state 5 commission can order BellSouth to perform 6 some activity under state law that 7 conflicts with the FCC's rules or 8 decisions regarding BellSouth's 9 obligations under federal law? 10 A. State versus Feds? 11 Q. Age-old question. 12 A. Age-old question. I believe that states 13 have rights to -- they have the authority 14 to protect the health, safety, and welfare 15 of their consumers, and those rights are 16 different than the federal government's 17 rights under the commercial -- 18 Q. Okay. Hypothetically -- 19 A. -- clause. 20 Q. Hypothetically, let's say that the Feds 21 say, BellSouth, you don't have to provide 22 unbundled mass market switching, all 23 right. 24 If the North Carolina Utilities 25 Commission said, BellSouth, under state</p>	<p style="text-align: right;">Page 246</p> <p>1 Q. Okay. I mean, again, my same example, 2 federal government says you don't have to 3 provide unbundled local switching, local 4 circuit switching. North Carolina says 5 that, under state law, BellSouth does. 6 Wouldn't you agree that that would be a 7 conflict between what the federal 8 government or the FCC has said in relation 9 to BellSouth's obligation under federal 10 law and between what the North Carolina 11 Commission says under state law? 12 A. It's very speculative for me still, simply 13 because I would expect the FCC to say 14 specifically, you have no unbundling 15 obligation under 251. 16 Q. Uh-huh. 17 A. And to -- to limit their findings on 18 whether or not there's an unbundling 19 obligation, 251 obligation, and not to 20 rule as to whether or not there may be 21 secondary obligations under state law. 22 Q. Okay. Do you believe that it is 23 permissible for a state to order under 24 state law the same act that the federal 25 government has said BellSouth is not</p>

32 (Pages 243 to 246)

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1 obligated to provide?
2 MR. CAMPEN: Objection to form of
3 the question.
4 A. And I may be getting caught up in the
5 authority because, again, I would expect
6 that the commission -- the FCC is going
7 to say personally to your 251 obligations,
8 you do not have to provide such unbundling
9 and that the state -- and I'm not
10 familiar with the state unbundling
11 laws -- should seek its authority in some
12 other doctrine.
13 So if, for example, the FCC said
14 there's no mass market switching or
15 unbundling obligations under Section 251
16 of the Act, for the state to come and say
17 for section 2 -- no, there definitely is
18 under that exact same section of the Act
19 an unbundling obligation, yes, that would
20 be preemptive. But if the state has found
21 its authority via some statutory
22 requirement that -- at the state level,
23 then I don't know that the doctrine would
24 preemptively apply.
25 Q. Have you received a legal opinion on that?

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1 A. No. We're going to look for them though.
2 We've not really had to address the issue
3 yet.
4 Q. Has KMC petitioned the North Carolina
5 Commission to initiate an arbitration
6 proceeding under state law?
7 A. Yes.
8 Q. Are you positive of that?
9 A. I believe our arbitration would have been
10 under the -- under the federal act as
11 well as any laws that, for example,
12 established even the commission itself. I
13 don't have the arbitration petition --
14 no, this is just rebuttal testimony.
15 Q. Do you know if in the petition for
16 arbitration KMC identified any state law
17 unbundling obligations or requirements as
18 a grounds for opening up the arbitration
19 proceeding?
20 A. No. Our arbitration proceeding was opened
21 pursuant to federal law.
22 Q. Look on page 154 of your North Carolina
23 rebuttal testimony, lines 10 through 15.
24 (PAUSE.)
25 A. Okay.

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1 Q. You state that, as an initial matter, the
2 Joint Petitioners have never stated that
3 the commission may issue an order that
4 conflicts with FCC 04-179 or any other FCC
5 order. The Joint Petitioners appreciate
6 the concept of preemption. However, FCC
7 04-179 is not a complete preemption of
8 State Commission authority; the commission
9 retains the ability to order unbundling
10 under federal and state law. Do you see
11 that?
12 A. Yes.
13 Q. How could a state commission order
14 unbundling under federal law if the FCC
15 says that there is no unbundling under
16 federal law?
17 A. I think, again, it depends on the scope of
18 the FCC's order. In the example I used
19 earlier, I cited if the FCC issued final
20 rules that eliminated unbundling
21 obligations under Section 251 of the Act,
22 there might continue to be unbundling
23 obligations under Section 271 of the Act.
24 And the state could continue to hear and
25 to decide on matters associated with

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1 unbundling obligations under 271.
2 Q. In a 252 arbitration providing?
3 A. They're deciding indemnification
4 provisions, limitations of liability, you
5 know.
6 Q. So your answer is yes?
7 A. Yes. Yes.
8 Q. How could the commission order unbundling
9 under state law?
10 A. Again, I'm not -- I don't have any
11 specific state laws --
12 Q. Well, then --
13 A. -- to -- to respond to that.
14 Q. Did you write this testimony?
15 A. We wrote it as a collaborative effort.
16 Q. What did you mean when you said, the
17 commission retains the ability to order
18 unbundling under federal and state law?
19 A. To the extent state laws exists and to the
20 extent that state laws provide for
21 unbundling. Again, we've never had to
22 utilize and leverage state law to
23 establish our unbundling obligations
24 because we've had the federal laws that
25 were provided and are necessary for our

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1 business models. Should the federal laws
2 no longer provide those unbundling
3 obligations, then we would have to
4 specifically identify a state unbundling
5 obligations we believe applied, and we
6 would negotiate based on those.
7 Q. And it's your opinion that, to the extent
8 the federal law removes an obligation that
9 a state commission -- any state commission
10 authority that allows it, to resurrect
11 that obligation under state law would not
12 be in conflict with federal law?
13 A. I believe the ultimate question as to
14 whether or not it's in conflict would have
15 to be decided by a court.
16 Q. Not this Commission?
17 A. It's a conflict of law issue. I believe
18 it would probably be decided by a court.
19 Q. What is your -- strike that.
20 We are -- And this in the
21 supplemental issues -- we are addressing,
22 if you would agree with this statement, we
23 are addressing how or if the FCC's final
24 rules, whatever they may be, should be --
25 whether they should be automatically

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1 incorporated. Would you agree that's an
2 issue?
3 A. Yes.
4 Q. Yes?
5 A. Yes.
6 Q. Okay. You would agree with me that, to
7 date, we have not teed up any specific
8 issue relating to the substance of the
9 final rules?
10 A. Correct.
11 Q. And that they don't even exist?
12 A. Indeed, that is correct.
13 Q. Okay. As of today, do you believe the
14 Interim Rules Order is in effect?
15 A. Yes.
16 Q. If the DC Circuit vacates the Interim
17 Rules Order, what do you believe should
18 happen?
19 A. If the DC Circuit vacated -- is this --
20 are the Interim Rules -- oh, the
21 mandamus.
22 Q. Mandamus, yeah.
23 A. Oh, okay. Then what should happen?
24 Q. Uh-huh.
25 A. I'd have to look for the DC Court to tell

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1 me.
2 Q. Do you not have a position?
3 A. No, I have no position.
4 Q. Do you know if that is an issue -- if
5 that is an issue in this arbitration?
6 A. I believe it was.
7 Q. Do you know what your position is in your
8 testimony?
9 A. Which issue?
10 Q. I believe it's S something.
11 A. Remember, our testimony was drafted in
12 advance of the final rules. So when you
13 ask the question, what happened if the DC
14 Circuit Court of Appeals vacates the
15 Interim Rules, it's a bit different than
16 the answer I would have given before
17 Wednesday, so...
18 Q. Well, I -- just so make sure, I --
19 A. So that's why I say, when I have no
20 position, I have no position because today
21 I would expect the final rules to take
22 place and it might be like vapor wear,
23 where the Interim Rules never existed, who
24 cares. We did nothing anyway in the
25 context of our contract.

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1 Q. And I appreciate the quandrum that we find
2 ourselves in, but they're still at issue
3 in the arbitration, so I'd like to get
4 your position as it existed prior to the
5 final rules.
6 A. Okay.
7 Q. Prior to the press release coming out.
8 A. Okay. Prior to the hope that the FCC's
9 actually going to deliver on its
10 commitment to issue final rules before
11 January 15th --
12 Q. Right.
13 A. -- or before the interim period expires.
14 MR. CAMPEN: Around pages 158 or
15 so of the rebuttal.
16 Q. Yeah. Let me see.
17 A. Okay.
18 Q. As you wrote the testimony, based upon the
19 facts that existed at the time that you
20 wrote it, what is your position if the DC
21 Circuit in January vacates the Interim
22 Rules Order?
23 A. If the DC Circuit in January vacated the
24 Interim Rules Order and as there are no
25 final rules in play, then we would

<p>Page 255</p> <p>1 negotiate based on those items that were 2 eliminated and those issues that were 3 affirmed via the USTA II decisions. 4 Q. Now, is it your opinion that the 5 transition period, as identified in the 6 Interim Rules Order, was not ordered by 7 the Commission? 8 A. The transition period or are you looking 9 for specific mechanisms? Is your question 10 with regard to specific mechanisms within 11 the transition order? 12 Q. What is your understanding of the 13 transition period as it's defined in the 14 Interim Rules Order? 15 A. Just one second, I'm sorry. 16 Q. Sure. 17 (PAUSE.) 18 A. Your question is, what is my understanding 19 of the -- 20 Q. The phrase transition period as it's used 21 in the Interim Rules Order. 22 A. The transition period refers to the period 23 between the issuance of the Interim Rules 24 and the issuance of final rules by the 25 Commission.</p>	<p>Page 257</p> <p>1 order the requirements in the transition 2 period? 3 A. There were some requirements in the 4 transition period and some 5 recommendations -- 6 Q. What do you -- 7 A. -- in the transition period. I believe 8 the FCC's order is applicable law, but as 9 noted, it could require integration, 10 negotiation, and implementation in 11 individual contracts. We, I believe, 12 agreed not to do so, but -- 13 Q. All right. Let's focus away from the 14 current agreement, okay. 15 A. Okay. 16 Q. Let's presume in a world that, for 17 whatever reason, we have to deal with the 18 fact in our future agreement that there 19 may be a situation where we need to 20 incorporate the Interim Rules Order into 21 the -- I don't know what you call -- you 22 call it the -- the retro -- 23 A. The replacement agreement. 24 Q. The replacement agreement. 25 A. The replacement. So let's assume that we</p>
<p>Page 256</p> <p>1 Q. And do you believe that the Interim Rules 2 Order set forth rules that would govern 3 the time period between the Interim period 4 and the final rules? 5 A. Indeed, yes. 6 Q. And do you believe that in the event the 7 final rules are not issued prior to the 8 expiration of the Interim period that the 9 transition period should govern the 10 parties' obligations to each other? 11 A. When you say "transition period", are you 12 asking, again, about the transition period 13 or the mechanisms? 14 Q. Not issue 23. 15 A. Okay. 16 Q. I'm talking about the FCC's rules and 17 requirements relating to what happens 18 after the expiration of the interim period 19 if there's no FCC and final unbundling 20 rules. 21 A. And your question is whether they apply or 22 whether they apply to our agreement? 23 Q. Whether, in your opinion, they apply. 24 A. They are applicable law. 25 Q. Is it your position that the FCC did not</p>	<p>Page 258</p> <p>1 had no issues open in this arbitration and 2 we were able to close all issues today 3 with the exception of integration of the 4 Interim Rules. 5 Q. Yeah. 6 A. Okay. So we're ready to sign our 7 agreement and make it effective and 8 binding. 9 Q. Uh-huh. 10 A. Okay. 11 Q. And there's no final rules. We're working 12 under the presumption the Interim Rules 13 Order. 14 A. Okay. 15 Q. Is it your position that the requirements 16 in the transition period would not be 17 applicable? 18 A. Which requirements are you referring to? 19 Q. If you look on paragraph 29. 20 A. Uh-huh. 21 Q. Page 16, the italicized portion of the 22 order after transition period. 23 A. Okay. Do you want me to look at the 24 italicized transition period? 25 Q. Well, I'm asking, do you -- is it your</p>

35 (Pages 255 to 258)

<p>Page 259</p> <p>1 opinion these rules or requirements would 2 be binding upon the parties? 3 A. This paragraph specifically -- or this 4 section specifically includes some 5 requirements that are rules or -- or I'll 6 put requirement and some that are 7 recommendations. So when you say, would 8 they be binding upon the parties, it's 9 difficult to discern because, for example, 10 it says that the Commission says -- 11 Q. Well, it may be easier if I can just ask 12 you to identify what you consider to be in 13 the text filing transition period as it's 14 italicized on page 16, what you believe to 15 constitute rules versus recommendations. 16 A. Okay. You know, in fact, as I read it, I 17 don't identify anything that is required. 18 This all appears to be a recommendation, 19 because it's all supplemental to the FCC's 20 phrase, we propose the following 21 requirements. 22 Q. So you believe that this -- the entire 23 text following the phrase transition 24 period is of no effect? 25 A. Unfortunately, the FCC did not -- did not</p>	<p>Page 261</p> <p>1 how the parties would operate in the 2 absence of FCC's final rules if it only 3 intended for 6 months of the 12 that 4 they've identified to actually apply? 5 A. I wish I could follow their logic. What I 6 actually believe the FCC was thinking is 7 that the second six months would never 8 apply, because I believe that they were 9 committed to getting the rules out in the 10 first six months. And the only reason 11 they even addressed the second six months 12 was to ameliorate concerns raised by the 13 ILEC and threat of a mandate. So I 14 believe the FCC only intended for the 15 first six months to really ever impact any 16 of us, because I believe they were 17 committed and confident they would get the 18 rules out in the first six-month period. 19 Q. Notwithstanding your belief, you would 20 agree with me that the order, as written, 21 envisions a 12-month transition plan? 22 A. As written, they provided themselves 12 23 months runway to get final rules out. 24 Q. And in your interpretation, only 6 months 25 of the 12 have been actually ordered.</p>
<p>Page 260</p> <p>1 specify it as a requirement. They 2 specifically said, we propose. 3 Q. Okay. Would you agree with me that the 4 FCC's intent in issuing the Interim Rules 5 Order was to promote a 12-month plan 6 resulting from the vacatur of certain 7 elements by the DC Circuit? 8 A. I believe that the FCC had several motives 9 in issuing the Interim Rules, and I'm not 10 sure that I could say what that was. 11 Q. Do you know if they used the phrase 12 12-month plan in their description of 13 what's required or what they're ordering 14 in the Interim Rules Order? 15 A. Yeah, I believe that they did set forth 16 what they called a 12-month plan. 17 Q. Do you know how long the interim period 18 was ordered to be? 19 A. The interim period was the first six 20 months. 21 Q. And do you know how the transition period 22 was designated to be? 23 A. The second six months. 24 Q. And do you believe that the FCC would have 25 used a 12-month time period to set forth</p>	<p>Page 262</p> <p>1 A. Under my interpretation, Interim Rules 2 were ordered in their entirety; however, 3 there is no requirement for pricing in the 4 transition period. There is no proposal 5 from the FCC. 6 Q. So what happens -- presuming no rules on 7 March 12th, 2005, what happens, in your 8 opinion, after the expiration of the 9 interim period? 10 A. After the expiration of the interim 11 period, presuming no final rules from the 12 FCC, I would envision that BellSouth -- 13 first of all, what I would envision is 14 that CLECs would seek clarification as to 15 whether loops are, in fact, vacated. 16 There's a fundamental disagreement as to 17 the scope of the vacatur. So that would 18 be the first thing that would happen. 19 And to the extent -- irrespective 20 of how that ultimate -- what the ultimate 21 legal conclusion is on that matter, what I 22 would envision, we would negotiate 23 implementation of this transition period 24 into the agreement and that BellSouth 25 might propose that we utilize this pricing</p>

36 (Pages 259 to 262)

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1 structure proposed by the FCC, that
2 BellSouth and KMC might, as we did this
3 summer, also as recommended by the FCC,
4 negotiate outside of the constructs of
5 this transition period and the
6 recommendations set forth in the
7 transition period. We might negotiate
8 alternative arrangements that are
9 different than the proposal set forth here
10 by the FCC.
11 And then we'd integrate those
12 terms into a contract and we'd continue to
13 operate until final rules came out.
14 Q. What happens though while we're
15 negotiating? What rules govern?
16 A. What rules govern?
17 Q. If it's after the expiration -- If
18 it's -- Interim period is over.
19 A. Correct.
20 Q. By its own definition, it's over on March
21 12th, six months. And it's your proposal
22 that the parties would negotiate how to
23 handle the next six months in the absence
24 of final rules; correct?
25 A. Correct.

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1 Q. So what rules govern after the interim
2 period?
3 A. Our contracts.
4 Q. And why do you believe that to be the
5 case, given that the FCC stated that
6 BellSouth or the ILECs only had an
7 obligation to freeze your certain terms
8 and conditions during the interim period?
9 A. Because we haven't amended it to say that
10 it wouldn't apply beyond any certain date.
11 Q. Did the parties amend the contract to --
12 A. Remember, it's my position that if the
13 Interim Rules had never been published,
14 that I would still be operating pursuant
15 to my contract until we change my
16 contract.
17 Q. Now, you would agree with me that the
18 Interim Rules Order presumed or -- or
19 stated that rates, terms, and conditions
20 with switching date, dedicated transport,
21 enterprise market loops were frozen. Do
22 you agree with that? If you look on
23 paragraph two -- or paragraph one of the
24 Interim Rules Order.
25 A. Yes.

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1 Q. Do you know what definition of dedicated
2 transport the Joint Petitioners are
3 recommending the Commission finds as the
4 definition that is frozen by the Interim
5 Rules Order?
6 A. It's the dedicated transport definition
7 that existed prior to the Triennial
8 Review.
9 Q. And -- Okay. So you would agree with me
10 that the definition --
11 A. Because it is the rate, terms, and
12 conditions that were in my existing
13 agreement, and my existing agreement did
14 not have another definition for dedicated
15 transport.
16 Q. Would you agree with me the definition in
17 your current agreement of dedicated
18 transport is different than the definition
19 established by the FCC in the TRO?
20 A. I do, and I recall that there was some
21 expectation regarding equity there because
22 many of us have not implemented the
23 Triennial Review benefits into our
24 contract, such as commingling.
25 There was no -- you know, we

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1 didn't get anything, we didn't give
2 anything. We froze the contracts in
3 place. Neither party was in any worse or
4 better situation than it was the day
5 before.
6 Q. But you would agree with the fundamental
7 principle that the definition that was
8 frozen or that you believe existed on June
9 15th, 2004, is not the same definition
10 that existed in the TRO for dedicated
11 transport?
12 A. Correct.
13 Q. And would you agree with me that the DC
14 Circuit in USTA II reviewed the definition
15 of dedicated transport that the FCC
16 established in the TRO?
17 A. Yes.
18 Q. Is the definition that's in your current
19 agreement -- or does the definition in
20 your current agreement provide you with
21 things that the definition in the TRO
22 removed from the definition of dedicated
23 transport?
24 A. Yes.
25 Q. Would you agree one of those things --

<p style="text-align: right;">Page 267</p> <p>1 because I really don't know what it is -- 2 would be OC-N level transmissions or 3 transition? 4 A. Yes. 5 Q. Would you agree that another thing would 6 be entrance facilities? 7 A. Yes. 8 Q. Do you believe that BellSouth has an 9 obligation to provide KMC with entrance 10 facilities during the interim period? 11 A. Yes. 12 Q. Why do you believe that the FCC intended 13 to freeze rates, terms, and conditions for 14 things that were not vacated by the 15 FCC -- by the DC Circuit? Excuse me. 16 A. Because there was disagreement as to what 17 was vacated. And I think the FCC even 18 used the term, assuming arguendo that 19 these things were vacated then. 20 Q. Are you sure about that or -- for 21 dedicated transport, are you sure that 22 there's any disagreement as to whether 23 USTA II vacated the rules? 24 A. Oh, dedicated transport, no. I'm speaking 25 in regard to -- I didn't know your</p>	<p style="text-align: right;">Page 269</p> <p>1 conditions you're operating under today 2 for these elements, please continue. 3 Q. Do you agree with me there were certain 4 portions of the TRO that were not vacated 5 or remanded by USTA II? 6 A. Yes. 7 Q. Do you agree there were portions of the 8 TRO that are remanded but not vacated -- 9 A. Yes. 10 Q. -- by USTA II? 11 And for those two specific 12 categories of things, are those matters of 13 law today? 14 A. Yes. 15 Q. Would you agree with me that the Interim 16 Rules Order and the purpose of the interim 17 period was to freeze those rates, terms, 18 and conditions associated with things that 19 were vacated? 20 A. Could you ask your question, again? 21 Q. Would you believe with me that the purpose 22 of the Interim Rules Order during the 23 interim period was to freeze those rates, 24 terms, and conditions associated with 25 things that were vacated by USTA II?</p>
<p style="text-align: right;">Page 268</p> <p>1 question was specific to dedicated 2 transport. 3 Q. Okay. Yeah, for dedicated transport, why 4 do you think that the FCC intended to 5 freeze KMC elements of the definition of 6 dedicated transport that were not vacated 7 by USTA II? 8 A. Again, I believe the FCC's intent was to 9 freeze our businesses as they were. 10 Q. Uh-huh. 11 A. So that their objective was to ensure that 12 we were no better or no worse off than we 13 were the day before. So as an example, 14 the FCC did not say -- you know, they 15 didn't say, now, go commingle all those 16 facilities, CLECs. You've got the right 17 to commingle in the Triennial Review 18 Order. Now, you've got the right to 19 commingle June 16th. 20 I think their intent was to try to 21 keep everybody on a level playing field to 22 give themselves time to sort through the 23 USTA II decision and to prepare final 24 rules. And their thought as to how to do 25 that was to say, okay, whatever terms and</p>	<p style="text-align: right;">Page 270</p> <p>1 A. No, because, as I noted, loops were not 2 vacated by USTA II. The purpose of the 3 Interim Rules was to give the Commission 4 time to sort through the USTA II decision, 5 to re-evaluate the 251 unbundling 6 obligations, and to issue final rules 7 without causing complete market 8 distortions and disruption in the interim. 9 Q. Do you believe that the Interim Rules 10 Order was intended to provide the CLECs 11 with rights that no longer existed as a 12 result of the TRO? 13 A. Could you please ask the question, 14 again? 15 Q. Sure. Do you believe that the purpose of 16 the Interim Rules Order was to provide 17 CLECs with rights that the TRO took away 18 and that USTA II did not remove or 19 invalidate? 20 A. I believe that the Commission, in their 21 issuance of the Interim Rules, intended 22 simply to stabilize carrier relations. 23 And in stabilizing carrier 24 relations, their intent was to freeze 25 whatever terms and conditions the carriers</p>

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1 were operating under as of the date of
2 their freeze.
3 Q. Is there any purpose for freezing anything
4 if there are currently rules in effect?
5 MR. CAMPEN: Objection to the form
6 of the question.
7 A. Could you restate? Repeat the question.
8 Q. Yeah. The question is simply, if rules
9 are in effect, why do you need to freeze
10 any portion or anything?
11 A. It's speculative. I'm not sure what the
12 Commission's thoughts were as to what
13 rules were in effect or weren't in effect.
14 Q. Put it this way. Do you think the FCC
15 intended to give CLECs greater rights
16 through the Interim Rules Order then they
17 had prior to the issuance of the Interim
18 Rules Order?
19 A. I believe that the FCC intended --
20 Q. Yes or no, Ms. Johnson. I don't mean to
21 interrupt you. I've been very cordial to
22 you in the last two days, so please, if
23 you could answer with yes or no and
24 respond, I would appreciate it.
25 A. Could you restate your question?

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1 Q. Sure. Do you believe through the FCC's
2 Interim Rules Order that they intended to
3 provide CLECs with rights -- greater
4 rights than they had prior to the
5 implementation of the Interim Rules Order?
6 MR. CAMPEN: Objection to the form
7 of the question.
8 A. No.
9 Q. Now, it appears -- and I'm optimistic --
10 that we are in agreement as to the
11 definition of switching as it's used in
12 the Interim Rules Order and what is
13 actually frozen regarding switching.
14 Would you agree with that?
15 A. I think that's an accurate assessment.
16 Q. Okay. And why is it that you believe that
17 the parties are in agreement as to the
18 definition of switching?
19 A. You accepted the Joint Petitioners'
20 language.
21 Q. What is the Joint Petitioners' rationale
22 for agreeing with BellSouth's position
23 that switching, as that term is used in
24 the Interim Rules Order, relates to mass
25 market switching?

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1 And if you need to refer to your
2 testimony, I think this is around S6 or 7.
3 A. Okay. Would you repeat the question?
4 Q. Sure. Why is it that the Joint
5 Petitioners believe that the definition of
6 switching, as it's used in the Interim
7 Rules Order, means mass market switching?
8 A. Because the Interim Rules Order included a
9 specific definition of switching in that
10 order.
11 Q. Do you know if USTA II vacated the FCC's
12 findings that there was no impairment for
13 enterprise market switching?
14 A. No.
15 Q. You don't know?
16 A. No. The FCC does not -- the USTA II did
17 not vacate that decision.
18 Q. Do you know if USTA II vacated the FCC's
19 decision regarding a finding of impairment
20 for mass market switching?
21 A. That's a difficult question, because USTA
22 II actually vacated the mechanism by which
23 they used to find impairment, so, I mean,
24 it's -- it's vacated and remanded, so
25 didn't say that the FCC couldn't come to

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1 some conclusion.
2 Q. No. I mean -- But you would agree with me
3 that the finding that there was impairment
4 in the -- for mass market switching was
5 vacated by USTA II?
6 A. That was the rationale for finding
7 impairment was vacated.
8 Q. And as a result of that, there weren't
9 rules related to mass market switching?
10 A. Correct. It was vacated and remanded.
11 Q. Now, I think you've recognized that the
12 parties are in disagreement as to whether
13 enterprise market loops were vacated by
14 USTA II; is that accurate?
15 A. That is accurate.
16 Q. Okay. Would you agree with me that the
17 Interim Rules Order presumes for
18 application or presumes simply that, as it
19 relates to the Interim Rules Order, the
20 enterprise market loops were vacated by
21 USTA II?
22 A. It presumes so, arguendo.
23 Q. Meaning for the sake of argument?
24 A. For the sake of argument.
25 Q. And you --

<p>Page 275</p> <p>1 A. But it doesn't presume that they were 2 vacated. 3 Q. No, I think we can agree that footnote 4 4 says what it says in the Interim Rules 5 Order? 6 A. Right. 7 Q. And that the parties were to treat 8 enterprise market loops, for the sake of 9 argument, as if they were vacated by USTA 10 II? 11 A. I would have a different characterization 12 of that. 13 Q. Okay. Well, let me hear yours. 14 A. My characterization is that, whether they 15 were or weren't, please continue to 16 treat -- whether they were or weren't, 17 these rules will apply for the interim 18 period. 19 Q. So you're limiting the FCC's finding or 20 its statements in footnote 4 of the 21 Interim Rules Order only to the interim 22 rules -- only to the interim period? 23 A. As I said before, with regard to the 24 transition period, the first thing I would 25 do is clarify that footnote. I'd ask for</p>	<p>Page 277</p> <p>1 question again. I believe that footnote 4 2 applies in the context of the order. 3 There's just no requirement that footnote 4 4 would be relevant to other than the 5 interim period because there are no 6 requirements in the transition period. 7 There's a proposal. 8 MR. MEZA: Why don't we take a 9 lunch break? 10 (RECESS.) 11 BY MR. CULPEPPER: 12 Q. Let's go back on the record. Good 13 afternoon, Ms. Johnson. Let's turn to 14 issue 95, backbilling. And can you define 15 backbilling for me? 16 A. Yes. Backbilling is the billing of 17 charges that were previously underbilled 18 via an inadvertent admission or otherwise 19 in a subsequent invoice. 20 Q. Does KMC backbill any of its customers? 21 A. KMC -- We're allowed to backbill its 22 customer. 23 Q. Is there any limitation in KMC's tariffs 24 or contracts on its ability to backbill 25 its customers?</p>
<p>Page 276</p> <p>1 absolute assurance. Were they vacated or 2 were they not vacated, because now I have 3 to know? 4 Q. So as you -- sitting here today, your 5 position is that footnote 4 is limited to 6 application during the Interim Rules 7 period -- excuse me, the interim period? 8 It's been a long week. 9 A. Footnote 4 applies throughout the context 10 of the order. My point to you is that the 11 transition period does not set forth any 12 specific requirements. And since it does 13 not, in order for us to negotiate as one 14 of the proposals from the FCC suggests, we 15 need to know that threshold question, were 16 those loops vacated or were they not 17 vacated? And so that we can move forward 18 with the transition period and integrating 19 that into our contracts. 20 Q. And so I guess my answer -- your answer 21 to my question would be that you believe 22 that footnote 4, in its statements, apply 23 only to the interim period; would that be 24 fair? 25 A. I think -- I'm going to try to answer the</p>	<p>Page 278</p> <p>1 A. Yes. 2 Q. What are those limitations? 3 A. By state, they vary. Some of them are as 4 follows, some states restrict our ability 5 to backbill for usage to 30 to 60 days. 6 Some states may have other restrictions on 7 billing for non-usage-based charges, and 8 customers may negotiate different 9 backbilling provisions depending on the 10 services they're purchasing in a contract. 11 Q. In your tariffs or any standard contract, 12 are there any KMC provisions or any 13 contract or tariff provisions related to 14 backbilling and specifically any 15 limitation on the ability to backbill? 16 And as clarification, I understood 17 your previous response, yes, KMC's 18 backbilling would be limited to whatever 19 applicable commission rule or statute 20 there may be; is that correct? 21 A. Correct. 22 Q. And I was just simply wanting to know if, 23 beyond that, is there any specific time 24 frames or limits in the KMC tariffs? 25 A. We have so many tariffs and then -- and</p>

40 (Pages 275 to 278)

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1 I'm trying to remember, because North
2 Carolina's details that we had in the
3 general terms and conditions -- and we
4 generally try to comply with whatever the
5 rule -- statutory rule is.
6 Q. Well, if you don't know, you don't know.
7 A. Yeah.
8 Q. But one thing I do want to ask you about
9 on Deposition Exhibit 25, which was the
10 North Carolina intrastate service terms
11 and conditions --
12 A. Right here.
13 Q. And the first paragraph of this document
14 states that these terms and conditions set
15 forth herein are taken from the general
16 rules and regulations section of our
17 former tariff filed with the North
18 Carolina Public Utilities Commission. Do
19 you see that?
20 A. Yes.
21 Q. Is it fair to say that these terms and
22 conditions essentially replace the KMC
23 tariff?
24 A. Yes.
25 Q. And would you agree with me that the KMC

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1 tariffs in the BellSouth states are the
2 same -- are substantially similar to
3 these terms and conditions?
4 How about subject to check, will
5 you agree with me that the terms and
6 conditions in the KMC tariffs in South
7 Carolina, Georgia, Louisiana, Alabama,
8 Kentucky, Mississippi, and Tennessee
9 are -- the terms and conditions are the
10 same or substantially similar?
11 A. Substantially similar, similar, subject to
12 check.
13 Q. And in Florida, you have a price list
14 instead of a tariff; correct?
15 A. Correct.
16 Q. And the same question, the terms would be
17 the same or substantially similar?
18 A. Substantially similar, subject to check.
19 Q. Thank you. I appreciate it, because I
20 didn't feel like pulling up the CD with
21 all those tariff provisions.
22 Can you look with me, if you will,
23 to Petitioners' proposed language in
24 attachment 7, section 1.1.3. And I'm
25 looking at the Joint Petitioners'

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1 version. And explain for me how the
2 language that states billed amounts for
3 services rendered more than one billing
4 period prior to the bill date shall be
5 invalid unless the billing party
6 identifies such billing as backbilling on
7 a line item basis. Would you just tell me
8 how that would operate, that proposed
9 language?
10 A. This proposed language is designed to
11 clearly require the billing party to
12 identify these amounts as backbilled
13 amounts and not to simply put them in the
14 invoice as if they were current services.
15 Q. Understood, but tell me -- I'm going to
16 put a hypothetical, you tell me if I got
17 it right or wrong. Services should have
18 been billed in January to KMC, certain
19 services but they weren't. They are then
20 billed in February. Does this language
21 apply to the billing that month to be
22 identified as backbilling?
23 A. Yes.
24 Q. Can you just turn to the next page, page
25 4 -- It's page 4, attachment of the --

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1 seven I have. There are two exceptions to
2 Joint Petitioners' proposed backbilling
3 language; correct?
4 A. Correct.
5 Q. The first exception, is it fair to say
6 that that first exception applies to
7 third-party charges that may be backbilled
8 to KMC?
9 A. Would you please restate your question?
10 Q. Sure.
11 A. I see exactly the provision you're looking
12 for.
13 Q. Earlier you were talking about -- there
14 was some discussion about ICO charges,
15 responsibility for them. I'm just trying
16 to get clear what this proposed exception
17 is applying to.
18 A. This proposed exception with regard to
19 backbilling --
20 Q. Right.
21 A. -- Is it applies to backbilling in
22 instances whereby an order for me to
23 bill -- an order for BellSouth to bill,
24 they would need records from third
25 parties, so -- and it would specifically

<p style="text-align: right;">Page 283</p> <p>1 meet point billing arrangements, which 2 is -- there's a whole guideline on meet 3 point billing arrangements and how meet 4 point billing arrangements work. 5 Q. And if BellSouth bills those amounts to 6 KMC, does KMC have provisions in place to 7 bill and collect that amounts on its end 8 users? 9 A. Subject to check, yes, generally. 10 Q. Can you give me an example of the second 11 proposed exception, the one that states 12 charges incorrectly billed due to 13 erroneous information supplied by the 14 nonbilling party? 15 A. Let's say, for example, that BellSouth 16 misrouted traffic to me and they routed 17 this traffic as over the local 18 interconnection trunks instead of over the 19 switched access trunks. So, as a 20 consequence, I wouldn't have identified it 21 as switched access traffic, so I wouldn't 22 have billed it properly. 23 But then we later find out that, 24 because of the misrouting, it was 25 misbilled, then I could backbill in order</p>	<p style="text-align: right;">Page 285</p> <p>1 periods that you would allow for each of 2 those have to do with basic accounting 3 principles. From a fundamental 4 perspective for disputes, you're talking 5 about amounts that are known. Those 6 amounts have been billed and either paid 7 or not paid, but they're known amounts, 8 because they've been billed. 9 When you're talking about 10 backbilling, you're talking about unknown 11 amounts, amounts that I would not have 12 even thought to provide an allowance for, 13 because there's just -- there's much 14 greater uncertainty. They're unknown. So 15 in order to have the greatest amount of 16 certainty, it's good to try to limit the 17 unknown. In this case, backbilling 18 amounts that are unknown should be limited 19 in some way. 20 Q. Does KMC currently take any allowance or 21 reserve for potential backbilling? 22 A. Quite -- let's see. We do not. We do 23 not. 24 Q. So if you don't take any allowance for 25 backbilling --</p>
<p style="text-align: right;">Page 284</p> <p>1 to adjust, because BellSouth provided me 2 erroneous information about that traffic, 3 so it caused me to bill it wrong or not 4 bill it. I need to backbill it in order 5 to adjust and properly bill for it. 6 Q. Can you tell me why the Joint Petitioners 7 draw a distinction between overbilling or 8 billing dispute and backbilling? 9 A. When you say "distinction", which specific 10 distinctions? 11 Q. BellSouth has proposed a two-year 12 limitation on a backbilling, which I 13 understand is an unacceptable offer, if 14 you will, although that is the agreed-upon 15 time frame for raising a billing dispute. 16 Tell me why there shouldn't be the same 17 time frame for raising a billing dispute 18 and a party's ability to backbill? 19 A. We didn't understand in the context of the 20 negotiations that BellSouth wanted to tie 21 the two time frames. But as you noted, we 22 did agree to the two-year time frame for 23 the disputes. 24 The fundamental reason to 25 distinguish and to differentiate the time</p>	<p style="text-align: right;">Page 286</p> <p>1 A. It's -- That was my point exactly. For 2 backbilling, it's so speculative, we -- 3 we would expect that each carrier had a 4 fundamental right, and you would want, 5 because my investors want me to get my 6 revenue accurate on my books, to be 7 diligent in my billing. And I hope that 8 we bill in order to make sure that revenue 9 and costs line up diligently. So I have 10 an incentive as the billing party to be 11 very diligent in matching my cost and my 12 revenue stream to get my bills out as 13 quickly as possible and as accurately as 14 possible. 15 Q. But backbilling occurs occasionally; 16 correct? 17 A. It does. 18 Q. And from an accounting standpoint, would 19 you think your company would take some 20 type of -- take it -- some reserve on 21 account that could happen? 22 A. The trouble there is GAAP. GAAP -- and 23 I'm, again, not a practicing CPA, but as I 24 understand it, GAAP principles require 25 that something be probable, reasonable,</p>

<p style="text-align: right;">Page 287</p> <p>1 and estimable. And the issue as it 2 relates to backbilling is that it's not 3 estimable. It doesn't meet those three 4 criteria. 5 Whereas when you're talking about 6 disputes, you know what -- the general 7 accuracy of the billing, you know the 8 general level of disputes, and you've been 9 billed for a certain amount of services. 10 But when you're talking about 11 backbilling, it lacks any of those 12 elements: Probable, reasonable, or 13 estimable. I can tell you, maybe it's 14 probable I'm going to be billed something 15 as backbilling, but it's not estimable. 16 It's reasonable that I might have to pay 17 it, but there's no way I can estimate what 18 backbilling may occur. 19 Q. So it would be a sound GAAP principle to 20 disregard it completely even though you 21 know you may get billed it, at least some 22 type of backbilling? 23 A. I don't know GAAP wants you making up 24 numbers, and that's what we'd be required 25 to do as it relates to backbilling. I</p>	<p style="text-align: right;">Page 289</p> <p>1 intensive to BellSouth? 2 And if you're looking for a 3 testimony cite, it's lines 8 and 9 on page 4 109. 5 MR. CAMPEN: Of the direct? 6 MR. CULPEPPER: Of the direct 7 testimony. 8 Q. And my question is simply, how do you know 9 what BellSouth entails or what costs were 10 incurred to BellSouth to make these 11 changes, these LEC -- these, you know, 12 name changes? 13 A. And I don't want to oversimplify it, but 14 we did start by saying it's my 15 understanding that the LEC changes, that 16 BellSouth maintains this data in the 17 systems. And because systems allow us to 18 do many flexible things that before we had 19 systems we could not do, it would seem to 20 be that we could run programs that would 21 do record changes for us through our 22 systems and make LEC changes. 23 Q. Do you know what it costs KMC to make 24 records changes? 25 A. I know we don't charge our customers for</p>
<p style="text-align: right;">Page 288</p> <p>1 could get a backbill for -- for example, 2 Sprint backbilled me for channel terms for 3 \$2.6 million. How would I have known that 4 was coming down the pipe? I went for a 5 whole year the year before that and didn't 6 get backbilled anything. The things that 7 carriers have a tendency to backbill for 8 could be wide and varied. There would be 9 no principle upon which to estimate, no 10 logical principle. 11 And that's, again, why we think 12 it's important to limit backbilling 13 because the range could be so varied, we 14 need to have control and to be able to 15 account for and close our books, just as 16 BellSouth should want to be able to 17 account and close its books. 18 Q. You have some auditing background. Are 19 you a CPA? 20 A. No. 21 Q. Let's go to issue 96, charges for LEC name 22 changes. What's your basis -- or for the 23 statement or the assertion that LEC 24 name -- LEC changes are administrative 25 changes that are not unduly time or labor</p>	<p style="text-align: right;">Page 290</p> <p>1 it, but I don't know what the cost is. 2 Q. You don't charge your customers in any 3 instance? 4 A. To change their -- To make the change to 5 their name on our accounts? 6 Q. Yeah. 7 A. No. 8 Q. Let's go to issue 97, payment due date. 9 Does KMC expect its customers to pay KMC 10 on a timely basis? 11 A. Yes. 12 Q. Does KMC allow its customers in its 13 contracts or tariffs 30 days upon receipt 14 of a KMC bill to pay its invoice? 15 A. Contracts may vary, as you know, so we 16 have certainly negotiated 30 and beyond 17 days, but I'm going to reference our North 18 Carolina statement of general terms to see 19 what we provided for here. 20 Q. And you might want to look at 2.5.2. 21 A. That's exactly where I am, 2.5.2. 22 Q. Right. And my question is, in KMC's 23 tariffs, KMC is requiring payment within 24 30 days of an invoice date; correct? 25 A. Within 30 days of an invoice date, but</p>

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<p>Page 291</p> <p>1 let's remember this is an end-user 2 invoice. This is not a carrier access 3 bill or a carrier local bill. So we're 4 talking about the difference between the 5 amount of time required to audit and 6 review a no more than 12-page bill versus 7 the amount of time to audit and review 8 2,000 invoices that may be -- you know, 9 that are coming in files that are so 10 large, they must be FTP. 11 Q. Does KMC audit its bills from BellSouth on 12 a monthly basis? 13 A. When you use the term audit -- and I used 14 it, so, I mean, only using it in response 15 to me, but we do have an access cost 16 management group that's probably similar 17 to functions within BellSouth. Has a 18 responsibility to review invoices for 19 validity to identify potential disputes or 20 any disputes, to file those disputes and 21 then to process those invoices for 22 payment. 23 Q. I appreciate that, but my question was, 24 does KMC audit its bills from BellSouth on 25 a monthly basis?</p>	<p>Page 293</p> <p>1 Q. And is this a KMC commercial contract? 2 A. Yes. 3 Q. Now, let's look at 4.3. Actually, 4.3 is 4 a deposit provision. 5 A. 4.4. 6 Q. Yeah, thanks. And in KMC's commercial 7 contracts, again, just like the tariff, 8 KMC is requiring its customers to pay no 9 later than 30 days from the date of the 10 invoice due date? 11 A. Is that a question? 12 Q. I mean, is that -- 13 A. It's not, because, remember, this is 14 subject to negotiation. So this is KMC's 15 request. It is not a requirement. So our 16 customers would negotiate these 17 provisions. 18 Q. But this is the starting point? This is 19 the standard KMC contract? 20 A. This is KMC's standard request. 21 Q. It's not -- It's a request? 22 A. Right. This contract is subject to 23 negotiation, and customers frequently 24 negotiate provisions when given these 25 agreements. I wish they just signed</p>
<p>Page 292</p> <p>1 A. How do you define the term "audit"? 2 Q. You're the one that mentioned that carrier 3 bills needed to be reviewed and audited. 4 A. And that's why I issued you the following 5 clarifying statement that what our group 6 does is, they receive the bills. They 7 review those bills to identify disputes. 8 They file disputes. They issue requests 9 for payment. 10 MR. CULPEPPER: Madam Court 11 Reporter, if you would mark that as the 12 next exhibit. 13 (DEPOSITION EXHIBIT NO. 29 WAS MARKED.) 14 Q. This is a KMC master contract I'll 15 represent to you was produced to BellSouth 16 in response. It was produced in June of 17 this -- of June of 2004 in response to 18 BellSouth's request for production number 19 16. 20 MR. CULPEPPER: Mr. Campen, 21 there's a copy of the Joint Petitioners' 22 response. 23 Q. Ms. Johnson, are you familiar with this 24 KMC master contract? 25 A. Yes.</p>	<p>Page 294</p> <p>1 it -- 2 Q. I understand. 3 A. -- and gave it back, but they don't. 4 Q. How many times has a customer deviated on 5 the standard payment terms in a KMC 6 commercial contract as set forth in 4.4? 7 A. Well, I know that they have. I don't know 8 how many times, because I'm not directly 9 responsible for negotiating those 10 commercial arrangements. 11 Q. So you don't know? 12 A. I know for a fact that they have 13 deviated. I don't know the frequency of 14 that deviation. 15 Q. Can you tell me from your own experience 16 what customers deviated on the standard 17 payment term language in a KMC contract? 18 A. I don't remember exactly here today. 19 Q. Do you know when there was -- when that 20 contract was -- the ones that you're 21 familiar with, can you give me a time 22 frame of when there was that deviation? 23 A. Are you asking what date I entered into a 24 contract? 25 Q. Yeah. Was it last year; was it, you know,</p>

<p style="text-align: right;">Page 295</p> <p>1 a few months ago?</p> <p>2 A. Last year.</p> <p>3 Q. What were the terms?</p> <p>4 A. I don't recall. I know that they were</p> <p>5 negotiated. As I'm just vaguely</p> <p>6 remembering, we, in fact, agreed to 45</p> <p>7 days with a customer in one instance.</p> <p>8 Don't ask me to remember exactly which</p> <p>9 contract at this point in time. But this</p> <p>10 term is subject to negotiation, as our</p> <p>11 customers are always, again, negotiating.</p> <p>12 We provide services in a</p> <p>13 competitive environment. They can always</p> <p>14 go back -- and many times we're competing</p> <p>15 against BellSouth for these customers, so</p> <p>16 they have options, and we have no option</p> <p>17 other than to negotiate the terms of our</p> <p>18 master servicing agreement.</p> <p>19 Q. What did KMC get, if anything, in return</p> <p>20 for the 45-day payment provision?</p> <p>21 A. The benefit of having that customer.</p> <p>22 Q. Any other terms that were deviated from?</p> <p>23 A. I can't say specifically.</p> <p>24 Q. And only if you recall, when KMC deviated</p> <p>25 in the example you just gave me, was the</p>	<p style="text-align: right;">Page 297</p> <p>1 of whether or not it's going to enter into</p> <p>2 a contract with a customer; right?</p> <p>3 A. KMC does.</p> <p>4 Q. Does your company charge its customers</p> <p>5 late payment charges?</p> <p>6 A. KMC does.</p> <p>7 Q. Does KMC waive those charges?</p> <p>8 A. Depending on the circumstance.</p> <p>9 Q. How often does it take KMC to receive its</p> <p>10 bills from BellSouth?</p> <p>11 A. Our experience is generally in the range</p> <p>12 of the other Petitioners, about seven</p> <p>13 days.</p> <p>14 Q. Has KMC ever taken any type of study to</p> <p>15 determine how long it takes to receive a</p> <p>16 BellSouth bill?</p> <p>17 A. Not a formal study.</p> <p>18 Q. How about an informal study?</p> <p>19 A. Yes, we inquired of our billing</p> <p>20 department.</p> <p>21 Q. Was it -- When you say it takes about</p> <p>22 seven days, are you talking about -- what</p> <p>23 types of BellSouth bills are you talking</p> <p>24 about?</p> <p>25 A. Electronic invoices. We receive a number</p>
<p style="text-align: right;">Page 296</p> <p>1 deviation simply a replacement of the 30</p> <p>2 days with 45?</p> <p>3 A. No. We deviated to include from receipt.</p> <p>4 Q. 45 days from receipt?</p> <p>5 A. We have deviated. And when we do so, the</p> <p>6 provision that we give is we specify our</p> <p>7 delivery methodology. So as an example,</p> <p>8 we would say 30 days from receipt of</p> <p>9 invoice. Invoice will be FTP within X</p> <p>10 days on the first of every month.</p> <p>11 Q. When you say F?</p> <p>12 A. It's a file transfer protocol.</p> <p>13 Q. It's an electronic bill?</p> <p>14 A. It's an electronic bill.</p> <p>15 Q. In those instances, does KMC deliver any</p> <p>16 bill via courier or some other method to</p> <p>17 determine when the customer receives the</p> <p>18 bill?</p> <p>19 A. KMC delivers its bills to BellSouth via</p> <p>20 Federal Express to confirm receipt.</p> <p>21 Because we had an issue where BellSouth</p> <p>22 said they were not receiving bills. To</p> <p>23 ameliorate that, we began to deliver your</p> <p>24 bills with return receipt.</p> <p>25 Q. Now, just to be clear, KMC has an option</p>	<p style="text-align: right;">Page 298</p> <p>1 of our invoices electronically from</p> <p>2 BellSouth.</p> <p>3 Q. Do you receive any bills via -- receive</p> <p>4 any paper bills from BellSouth?</p> <p>5 A. There may be some, the minimum paper</p> <p>6 bills. We get about 2,000 bills a month,</p> <p>7 500 of which are paper, 1,500 of which are</p> <p>8 electronic. And those are not all just</p> <p>9 BellSouth bills, but in general. Some</p> <p>10 portion of the paper bills are</p> <p>11 BellSouth's.</p> <p>12 Q. Has KMC tracked how long it takes to</p> <p>13 receive bills from other vendors or</p> <p>14 suppliers?</p> <p>15 A. Not that I have knowledge of.</p> <p>16 Q. Why not?</p> <p>17 A. Why haven't we tracked how long? We may</p> <p>18 not have had an issue with regard to the</p> <p>19 payment coming.</p> <p>20 Q. Is this issue an issue that KMC has in any</p> <p>21 of its other arbitration proceedings or</p> <p>22 negotiations with other carriers?</p> <p>23 A. I don't recall. It's not an open issue.</p> <p>24 It would have been an issue from</p> <p>25 negotiation, and the parties would have</p>

45 (Pages 295 to 298)

<p style="text-align: right;">Page 299</p> <p>1 resolved it.</p> <p>2 Q. Does KMC hire any third party to review</p> <p>3 its bills or its BellSouth bills?</p> <p>4 A. When you say review, review in the course</p> <p>5 of -- the normal course of business or to</p> <p>6 audit?</p> <p>7 Q. Both. How about just in the normal course</p> <p>8 of business?</p> <p>9 A. I don't -- To my knowledge, we don't hire</p> <p>10 any third party to review our bills in the</p> <p>11 normal course of business. Of course, we</p> <p>12 are subject to auditing requirements, and</p> <p>13 we do have auditors come in and audit our</p> <p>14 financial statements, which may include an</p> <p>15 audit of BellSouth invoices.</p> <p>16 Q. It may include, so it may not include as</p> <p>17 well?</p> <p>18 A. It depends on the scope of the audit for</p> <p>19 the year. I'm not in the finance</p> <p>20 department.</p> <p>21 Q. Let's not go to the scope of the audits.</p> <p>22 A. Right. I'm not in the finance department.</p> <p>23 Q. Let's go to issue 99. To your knowledge,</p> <p>24 has there ever been any issue or dispute</p> <p>25 between BellSouth and KMC with respect to</p>	<p style="text-align: right;">Page 301</p> <p>1 provision states, in the event of</p> <p>2 fraudulent use of KMC Telecom's network,</p> <p>3 KMC Telecom will discontinue service</p> <p>4 without notice and/or seek legal recourse</p> <p>5 to recover all costs associated with</p> <p>6 enforcement of this provision.</p> <p>7 My question is, if a KMC customer</p> <p>8 disputed that there was any fraudulent use</p> <p>9 of services, what would KMC do?</p> <p>10 A. If a customer under the tariff did not</p> <p>11 find this provision important enough to</p> <p>12 negotiate and agreed to this term, we</p> <p>13 would follow the terms of our tariff. But</p> <p>14 the customer has an option to negotiate</p> <p>15 different terms via our contract.</p> <p>16 Q. As part of negotiations, would KMC agree</p> <p>17 to remove the right to terminate service</p> <p>18 because of fraudulent use of services</p> <p>19 provided to a customer?</p> <p>20 A. KMC would not forego that right. KMC</p> <p>21 would make that right subject to</p> <p>22 reasonable provisions such as notice to</p> <p>23 the customer, a reasonable time to cure,</p> <p>24 and ultimate disconnection if the remedy</p> <p>25 is not brought...</p>
<p style="text-align: right;">Page 300</p> <p>1 unauthorized or unlawful or improper use</p> <p>2 of services or facilities?</p> <p>3 A. Not that I can recall.</p> <p>4 Q. And I will -- let me just ask you.</p> <p>5 KMC -- In your contracts and in your</p> <p>6 tariffs; does KMC reserve the right to</p> <p>7 terminate its customer's service if there</p> <p>8 is a -- if there is any unlawful or</p> <p>9 improper use of the service?</p> <p>10 A. As noted, it may vary from contract to</p> <p>11 contract or subject to negotiation, but we</p> <p>12 do attempt to reserve that right. That</p> <p>13 would be our starting point.</p> <p>14 Q. So the answer is yes?</p> <p>15 A. Technically, the answer is it varies, and</p> <p>16 we would negotiate with the customer.</p> <p>17 Q. Is KMC willing to forego the -- forego</p> <p>18 terminating the service of a customer who</p> <p>19 is engaged in improper, illegal, or</p> <p>20 fraudulent use of services provided by</p> <p>21 KMC?</p> <p>22 A. Could you please restate that or repeat</p> <p>23 it?</p> <p>24 Q. Sure. Let's look at Exhibit 25. This is</p> <p>25 back to the KMC tariff 2.5.5F. And that</p>	<p style="text-align: right;">Page 302</p> <p>1 Q. The KMC master contract, is that --</p> <p>2 A. Exhibit 29.</p> <p>3 Q. Yeah. Does it contain the dispute</p> <p>4 resolution provision?</p> <p>5 A. It contains a billing dispute provision.</p> <p>6 It does not contain a general dispute</p> <p>7 provision. But, again, customers are free</p> <p>8 to negotiate a dispute provision.</p> <p>9 Q. To your knowledge, has KMC negotiated in</p> <p>10 any of its contracts a provision that</p> <p>11 would limit KMC's ability to terminate</p> <p>12 service because of improper, illegal,</p> <p>13 fraudulent use of service provided to a</p> <p>14 customer?</p> <p>15 A. Yes.</p> <p>16 Q. Who was it?</p> <p>17 A. The customer?</p> <p>18 Q. Uh-huh.</p> <p>19 A. Confidential, but --</p> <p>20 Q. Tell me the terms.</p> <p>21 A. Okay.</p> <p>22 Q. Yeah.</p> <p>23 A. The terms included -- in fact, we have</p> <p>24 this conversation with our customers</p> <p>25 because sometimes their fraudulent use may</p>

<p style="text-align: right;">Page 303</p> <p>1 jeopardize other customers' services. So 2 what we've negotiated, in fact, as 3 recently as a contract last week was for 4 reasonable notice and dispute, a 5 reasonable period to cure, and then a 6 follow-up notice regarding the right to 7 disconnect if it was jeopardizing, again, 8 our network and jeopardizing other 9 customers' services. Because that's -- 10 you know, disconnecting a customer impacts 11 their business, wholesale environment. It 12 may also impact their customers, so we 13 don't take that action lightly. 14 So absent jeopardizing my network 15 or my other customers' services, we 16 provide in the negotiations process 17 reasonable opportunity to the customer to 18 resolve and remedy fraudulent use. 19 Q. The provisions you just described there, 20 did it contain any particular time frames? 21 A. We, I believe, started in the request in 22 the negotiations process with ten days. 23 Q. Ten calendar days? 24 A. Ten calendar days. 25 Q. Okay. And do you know or recall what was</p>	<p style="text-align: right;">Page 305</p> <p>1 A. Or suspension. 2 Q. Let's turn to issue 100. Should a CLEC be 3 required or one of the Joint Petitioners 4 required to pay all amounts due -- past 5 due to avoid suspension or termination of 6 service. And has your company received 7 any suspension letters from BellSouth with 8 respect to nonpayment for services 9 provided? 10 A. I'd have to say not recently. We may have 11 received them back in about 2000. 12 Q. Let's go back to the KMC master service 13 agreement, section 7.3. And here I 14 believe it states that KMC, upon written 15 notice, may immediately terminate its 16 customer's service for failure to pay an 17 invoice or failure to pay a security 18 deposit; is that correct? 19 A. Correct. And, again, I wish they would 20 sign this, and they don't. For whatever 21 reason, they just don't. 22 Q. And, again, the same question, how many 23 times do you know KMC has deviated from 24 this language here in 7.3? 25 A. Again, I don't know the exact frequency.</p>
<p style="text-align: right;">Page 304</p> <p>1 actually agreed to? 2 A. No. In the instant case, the contract is 3 not completed. 4 Q. Still subject to negotiations? 5 A. Still subject to negotiation. 6 Q. Well, has BellSouth ever terminated or 7 suspended any service that it provides to 8 KMC or suspended any access to any 9 ordering system? 10 A. Due to fraudulent use? 11 Q. For any reason? 12 A. I do recall vaguely threatening notice of 13 suspension and access to OSS due to 14 failure to pay a security deposit or an 15 increased -- a request for an increase in 16 a security deposit. There's probably 17 around 2000. 18 Q. So there was a notice or a threat? 19 A. A threat, right. I don't recall whether 20 it was an informal notice under the 21 agreement or not. 22 Q. Do you recall if there was any actual 23 termination of service? 24 A. No actual termination of service. 25 Q. Or suspension?</p>	<p style="text-align: right;">Page 306</p> <p>1 I can tell you I have not seen a contract 2 that included this language in its final 3 form. 4 Q. But some customers, I assume -- you tell 5 me if I'm wrong -- sign KMC's master 6 service agreement and sign it without 7 making any changes to section 7.3 here; 8 correct? 9 A. I cannot say that there have been 10 customers who have. 11 Q. You can't say -- 12 A. Like I said, I have never seen an 13 agreement where a customer did not alter 14 that provision, but I don't know the 15 frequency across all agreements. So I 16 can't say that it's never been changed. 17 My statistical sample would say, it's 18 always changed because every contract I've 19 ever seen, it has been. 20 Q. So it's your testimony that every KMC 21 commercial contract is changed or modified 22 in some form or fashion? 23 MR. CAMPEN: Objection. Asked and 24 answered. She's answered that she hasn't 25 seen them all. The ones she's seen are</p>

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<p>Page 307</p> <p>1 all that has changed -- has been changed. 2 MR. CULPEPPER: Not -- That's not 3 how I understood her answer. 4 Q. Let's back up and take it again. All 5 right. You tell me again if I've got it 6 wrong. 7 The contract revisions that you 8 are familiar with are contracts that you 9 have reviewed, every customer changed this 10 section 7.3? 11 A. Correct. But, similarly, I have not seen 12 them all. 13 Q. And if a customer did not change section 14 7.3, would you have any reason to review 15 or see that particular contract? 16 A. Yes. 17 Q. You would still see it or would -- 18 A. Somebody would still see it. 19 Q. Do you think we -- 20 A. The salespeople have to submit them to 21 make sure that the contract did, in fact, 22 conform and was not, in fact, changed. 23 Q. If the contract was not changed in any 24 fashion, would it be reviewed by anybody 25 at KMC?</p>	<p>Page 309</p> <p>1 A. I do. 2 Q. Have you got any -- Do you have any 3 evidence of any bad actions by BellSouth 4 with respect to receiving payment? 5 A. Let me provide an example. Maybe in 2001, 6 KMC and BellSouth entered into a 7 settlement agreement to resolve an issue 8 regarding the percent local facility 9 billing for interconnection facilities. 10 At that point in time, KMC was 11 in -- was behind on several accounts to 12 BellSouth. And as a result of that 13 settlement, we agreed we'd offset. When 14 we tried to offset, it took us some -- 15 maybe a week to two weeks to reconcile 16 what BellSouth believed is clearly 17 outstanding and in arrears because several 18 disputes that we had filed had not been 19 posted timely. 20 So that's an example of a bad act, 21 that BellSouth's not posting our dispute 22 timely and it could impact BellSouth's 23 assessment as to what amounts are in 24 arrears and what aging is appropriate for 25 those amounts and to leave us to have to</p>
<p>Page 308</p> <p>1 A. Yes. The sales leadership. You have 2 to -- yes. 3 Q. Has KMC ever received -- I think I asked 4 this question earlier. Let me just make 5 sure I got it right on the record. 6 Has KMC received a suspension 7 notice from BellSouth, suspension of 8 service for nonpayment? 9 A. I think we did in 2000. I don't know. 10 Q. How did it get resolved? 11 A. I'm sure we eventually cured the 12 nonpayment. 13 Q. Do you remember how much was involved? 14 A. No. 15 Q. Let's look at page 123 in your direct 16 testimony. No, I take that back. 17 Referring to page 123 of the 18 rebuttal testimony on this same issue. 19 Lines 18 through 21, you state that Joint 20 Petitioners -- and our customers -- 21 could be shut down based on a simple 22 calculation error, a bad prediction about 23 BellSouth posting performance, or by bad 24 actions on the behalf -- on the part of 25 BellSouth. Do you see that language?</p>	<p>Page 310</p> <p>1 calculate that and to count for that and 2 to be subject to penalty should we be 3 wrong because we disagreed with BellSouth 4 because we didn't understand that 5 BellSouth had not posted disputes is not 6 reasonable. 7 Q. Let's go to issue 101. And this is on 8 direct testimony at page 123 where your 9 testimony starts. Lines 12 and 13. It 10 states that Petitioners agree to language 11 that expands BellSouth's right to collect 12 deposits well beyond what is found in its 13 typical tariffs. What typical tariffs are 14 you referring to there? 15 A. Special access tariffs. 16 Q. But we're talking about -- But tell me if 17 I'm wrong, we're talking about BellSouth 18 tariffs? 19 A. Correct. 20 Q. Let's go back to Deposition Exhibit 25, 21 KMC tariff. And let's go to 2.5.4, 22 deposits. 23 Now, it appears to me here that 24 KMC reserves the right to demand a 25 two-months -- a deposit that would not</p>

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1 exceed two months' charges and may also
2 require advance payment of services, which
3 could include all nonrecurring charges and
4 up to one month's charges for services
5 provided; is that correct?
6 A. That is correct.
7 Q. Do you consider KMC's tariffs to be
8 typical tariffs?
9 A. Typical CLEC tariffs or --
10 Q. Let's start with typical CLEC tariffs.
11 A. Correct.
12 Q. How about typical ILEC tariffs?
13 A. I'm not so certain as to how ILECs compare
14 with SPC. Again, we provide services via
15 contracts. So if this provision is
16 important to a customer, they may elect to
17 negotiate via contract.
18 Q. While we're talking about tariffs, isn't
19 it true that your KMC Louisiana tariff
20 provides for a deposit not to exceed
21 two-and-a-half months; right?
22 A. It does. And, again, if that provision is
23 particularly important or onerous to a
24 customer, they have the right to negotiate
25 a contract.

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1 Q. And in the contract, which was -- keep
2 forgetting the Exhibit -- No. 29?
3 MR. CAMPEN: 29.
4 MR. CULPEPPER: 29. Thanks.
5 Q. 4.3, doesn't it provide essentially the
6 same thing, that KMC may require
7 additional security of its choice in an
8 amount equal to two months' worth of
9 services based upon customer's highest
10 invoice over the prior six-month period?
11 A. If I could get them all to sign it, that
12 would be a principle.
13 Q. And, again, let's talk about the deposit
14 provision in your commercial contract.
15 But isn't that so -- the KMC master
16 contract, it contains a deposit provision
17 that allows for a two-month deposit;
18 right?
19 A. Subject to negotiation.
20 Q. Subject to negotiation.
21 A. Right.
22 Q. And is this particular clause -- how many
23 times are you aware that it's been
24 negotiated?
25 A. In my experience, I've never seen an

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1 agreement that has not included
2 negotiation of the deposit requirements.
3 Q. So every KMC commercial customer
4 negotiates that particular agreement?
5 A. Every agreement that I have seen, this
6 provision is negotiated.
7 Q. Do you see all the contracts that are
8 signed?
9 A. I do not.
10 Q. Can you give me a percentage of how many
11 contracts you do see, whether it's half of
12 them or something else, I don't know?
13 A. If you'd like to qualify that percentage
14 by materiality.
15 Q. What do you mean when you say
16 "materiality"?
17 A. I don't look at contracts for thousand
18 dollar services in a month, but for
19 contracts that are fairly large, maybe
20 \$25,000 worth of services a month, \$5,000
21 worth of services a month, I probably see
22 25 percent of those. But for contracts
23 that are not large or material, I don't
24 see many of those. That's not to say that
25 our legal department doesn't see them.

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1 It's to say that there's no need to have
2 me provide the change.
3 Q. Smaller dollar amount contracts, are they
4 typically modified or revised?
5 A. (Witness nods head up and down.)
6 Q. Is the answer yes?
7 A. Yes. I'm sorry.
8 Q. Do you have any idea how many or -- let
9 me strike that.
10 Smaller dollar contracts, are some
11 of them simply signed by KMC customers?
12 A. Remember, customers can purchase contracts
13 from our tariff. So if a customer didn't
14 want to negotiate the provisions of
15 service, they would not likely even seek
16 the master service agreement to negotiate
17 from it. They would buy services from our
18 tariff.
19 Q. In this tariff, they would be subject to a
20 two-month deposit plus possibly the
21 requirement to pay an advance payment as
22 well; right?
23 A. Subject to our tariffs.
24 Q. In this master contract in 4.3 on page 4,
25 I think it goes on to provide that failure

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1 to provide the additional security shall
2 result in immediate termination of
3 services and shall subject customer to
4 termination fee. Do you see that
5 particular language?
6 A. Could you give the reference again?
7 Q. It is 4 3, the same as in this -- what
8 I'll call the deposit provision of y'all's
9 contract. And it's the last line on the
10 top of page 4.
11 A. Could you repeat your question?
12 Q. Let me ask you this. Has KMC ever
13 terminated a customer for failure to pay
14 additional security amounts?
15 A. Not to my knowledge.
16 Q. But it has the right to do so; correct?
17 A. For services ordered under this
18 agreement. Remember, it is rare that a
19 customer is going to negotiate -- take
20 this agreement without negotiating
21 provisions. To my knowledge, I'm not
22 aware of any customer that has been
23 terminated because of this provision. And
24 we only have this provision where the
25 customer did not negotiate otherwise.

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1 Q. In short, it's your standard provision
2 that is subject to negotiation?
3 A. It's a standard provision subject to
4 negotiation.
5 Q. Well, do you consider the right to
6 terminate service for failure to pay a
7 deposit to be maximum value (phonetic)?
8 A. Could you help me understand the use of
9 the term value?
10 Q. Sure. And while we're on this topic, has
11 BellSouth ever terminated any service of
12 KMC in connection with any security
13 deposit disagreement?
14 A. Not that I'm aware of.
15 Q. Let's go to the offset provision issue,
16 issue 102. Page 126, line 12. There's
17 the assertion that BellSouth does not have
18 a pristine or even a good payment record
19 when it comes to paying CLPs the amount
20 BellSouth owes under its interconnection
21 agreements. Do you see that language,
22 page 126 of direct testimony?
23 A. Oh, I'm sorry. Yes.
24 Q. Lines 12 and 13?
25 A. I do see the reference there in that

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1 sentence.
2 Q. From your -- From KMC's perspective, what
3 knowledge do you have that substantiates
4 that assertion?
5 A. As an example -- And, again, really it's
6 an issue we've haggled on earlier this
7 year. BellSouth was in arrears on
8 average -- first of all, general
9 practice, BellSouth does not pay 100
10 percent of pay or the fee. A hundred
11 percent of the invoices KMC issues to
12 BellSouth, that's by BellSouth's
13 witnesses' own admission. BellSouth only
14 pays their disputes, invoices from KMC by
15 the due date 38 percent of the time. So
16 that means by definition delinquent fee
17 that the other 62 percent of the time,
18 BellSouth's delinquent because it has not
19 disputed nor has it paid amounts invoiced.
20 Q. Does KMC pay or dispute 100 percent of the
21 invoices it receives from BellSouth within
22 30 days?
23 A. Not always, no.
24 Q. Go to issue 103, CLEC termination of
25 service because of nonpayment of deposit

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1 Tell me what self-help means.
2 A. In my opinion, self-help, in the context
3 that it's used here, means that an
4 individual or company is acting as judge,
5 juror, and executor as it relates to an
6 issue such that the party is able to
7 decide what's wrong and remedy the issue
8 and -- without having an obligation of
9 any sort to negotiate or to conform in any
10 other way to another party's pressure.
11 Q. Does KMC have any self-help provisions in
12 its tariff or in its standard commercial
13 contract?
14 A. In our tariff and in the standards, but,
15 again, the standard is subject to
16 negotiation with customers.
17 Q. Do you consider any termination -- any
18 right to terminate to be maximum value?
19 And this time I'll give you --
20 A. Right. You want to go to my testimony.
21 Q. Let's go to your testimony. Bottom of 133
22 and top of 134. I knew I would find it.
23 And this is back on issue 103, and it
24 is -- the issue is the right to terminate
25 for nonpayment of a deposit.

<p style="text-align: right;">Page 319</p> <p>1 A. Do I consider it to be -- Will you repeat 2 the question, please? 3 Q. Sure. Any right to terminate, do you 4 consider such a right to be maximum 5 value? 6 A. I do indeed. 7 Q. So you consider your own company's tariffs 8 and contracts to be maximum value? 9 A. In that regard. That's why, again, our 10 contract terms are subject to 11 negotiation. If the customer had -- If a 12 customer was not satisfied that the 13 provisions of our tariff provided service 14 in a manner in which they'd like to pay 15 for those services, they're free to 16 contract with us via the contract 17 process. They're free to negotiate 18 provisions. And I'm sure if that was a 19 provision that -- of particular importance 20 to them, we would negotiate with them. 21 Q. Tell me why KMC is opposed to posting a 22 payment bond if there is a dispute over a 23 deposit amount. 24 A. Because, from a financial perspective, the 25 payment bond has the same effect as the</p>	<p style="text-align: right;">Page 321</p> <p>1 Q. And in this little hypothetical, would KMC 2 send the bond issuer, assuming it was 3 Mr. Campen, \$100 to issue a hundred dollar 4 bond? 5 A. No. 6 Q. It would be something less than \$100? 7 A. I believe something less, but I -- 8 believe me, the bond issuer wants to make 9 sure that I really am putting my finger on 10 that \$100. 11 Q. I've asked you several questions about KMC 12 tariffs as well as this master contract 13 that was produced in discovery. 14 Does KMC have any plans to modify 15 or change its tariff or its master 16 contract terms? 17 A. KMC's master contract has, in fact, been 18 modified and -- 19 Q. When? 20 A. I don't remember the exact date. 21 Q. Irrespective of the tariffs, is there any 22 plans to -- 23 A. No. 24 Q. No? 25 A. No, not on these particular provisions.</p>
<p style="text-align: right;">Page 320</p> <p>1 issuing cash almost to you, so it is 2 almost as if we're being obligated to pay 3 the deposit even though it's subject to 4 dispute. 5 Q. It's almost as if? 6 A. Right. It's just like invoicing. We -- 7 Under our terms of our agreement today for 8 every other service, we dispute and 9 withhold. Why would I have a different 10 requirement for the deposit provisions? I 11 would dispute and withhold. And should 12 there be a finding that a deposit is 13 payable, I would pay it, just as I do 14 other disputes under the agreement. 15 Q. Does a payment bond -- start over. 16 Would a payment bond in the amount 17 of \$100 cost KMC the same as writing a 18 check for \$100? 19 A. Either way I've got to allocate capital or 20 dollars to cover that amount. 21 Q. What do you mean when you say "allocate"? 22 A. When I present a payment bond, the bond 23 issuer wants to be sure that I've got the 24 money there, so you're tying up financial 25 resources of KMC's.</p>	<p style="text-align: right;">Page 322</p> <p>1 Q. Okay. And the master service agreement 2 that's been produced is -- the draft says 3 1/25/2002. Are you saying that are -- 4 there's a more current version? 5 A. We actually just undertook a project to 6 reconstruct all of our customer 7 agreements, so we have a new master 8 services agreement and a new -- we have 9 new service attachments, a complete new 10 contract. 11 Q. Have they been provided to your counsel? 12 A. I don't know that they were requested. 13 Q. They were requested, yes. Do you think 14 that -- well, would it be responsive 15 to -- through discovery request which 16 produced this particular contract which 17 says, produce all contracts that contain 18 any limitation of liability clause? 19 A. Yeah, but this is from June 2004. 20 Q. Understood. I mean -- well, let me just 21 ask you straight up. Do you have any 22 problem providing to your attorneys 23 produced in discovery the most recent 24 version of the KMC master service 25 agreement?</p>

51 (Pages 319 to 322)

Page 323		Page 325	
1	THE WITNESS: Do we have any	1	SIGNATURE
2	problem producing that?	2	I, Marva Johnson, do hereby state under
3	MR. CAMPEN: No.	3	oath that I have read the above and
4	Q. So that's a yes?	4	foregoing deposition in its entirety and
5	A. Yes. I'm hesitating simply because I	5	that the same is a full, true and correct
6	don't want to reopen discovery. I know	6	transcript of my testimony.
7	discovery's closed, and I didn't want	7	Signature is subject to corrections on
8	to...	8	attached errata sheet, if any.
9	Q. Was --	9	Marva Johnson
10	A. It's a supplemental response, so I'll	10	State of
11	supplement our response.	11	County of
12	MR. CULPEPPER: Thank you. I have	12	
13	no further questions.	13	Sworn to and subscribed before me this
14	THE WITNESS: Okay.	14	day of , 20 .
15	(THE DEPOSITION CONCLUDED AT 1:56 P.M.)	15	
16		16	Notary Public
17		17	My commission expires:
18		18	
19		19	
20		20	
21		21	
22		22	
23		23	
24		24	
25		25	

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1	ERRATA SHEET	1	CERTIFICATE
2		2	State of North Carolina
3	Case name: In the Matter of	3	County of Hamett
4		4	I, Nicole Ball Fleming, a notary public in
5	Joint Petition NewSouth	5	and for the State of North Carolina, do
6	Communications for	6	hereby certify that there came before me
7	Arbitration with BellSouth	7	on the 17th day of December, 2004, the
8		8	person hereinbefore named, who was by me
9	Deponent: Marva Johnson, Volume II	9	duly sworn to testify to the truth and
10		10	nothing but the truth of his knowledge
11	Date:	11	concerning the matters in controversy in
12		12	this cause, that the witness was thereupon
13	PAGE LINE READS SHOULD READ	13	examined under oath, the examination
14	/ / /	14	reduced to typewriting by myself; and the
15	/ / /	15	deposition is a true and accurate
16	/ / /	16	transcription of the testimony given by
17	/ / /	17	the witness.
18	/ / /	18	I further certify that I am not counsel
19	/ / /	19	for, nor in the employment of any of the
20	/ / /	20	parties to this action, that I am not
21	/ / /	21	related by blood or marriage to any of the
22	/ / /	22	parties, nor am I interested, either
23	/ / /	23	directly or indirectly, in the results of
24	/ / /	24	this action.
25	/ / /	25	In witness whereof, I have hereto set my
			hand and affixed my official notarial
			seal, this the 3rd day of January, 2005
			Nicole Ball Fleming
			Notary Public
			My commission expires 4/30/05

A				
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<p>Page 6</p> <p>1 A. Yes, sir. 2 Q. If at any time you need to take a break, 3 I'll be sure to accommodate you. And if 4 you don't understand my question, please 5 feel free to ask me to clarify it at any 6 time; okay? 7 A. Yes. 8 Q. Okay. Do you know what a load coil is? 9 A. Yes. 10 Q. What is it? 11 A. Load coil's used in conditioning a line to 12 provide a better quality loop for a 13 particular type of service, usually voice. 14 Q. Can it be used for any other type of 15 service? 16 A. I would have to speculate on that, but I 17 would imagine it could be used for other 18 types of services. There's other services 19 out there that KMC does not use that I'm 20 sure it could be used for. 21 Q. Do you have any personal knowledge of ways 22 in which a load coil can be used for 23 services other than voice? 24 A. No. 25 Q. Does KMC currently use loops that it</p>	<p>Page 8</p> <p>1 have -- typically over T-1 type services 2 where you're referring to internet. We 3 use the integrated product or take that as 4 full T-1 out to the customer for full T-1 5 or multiple T-1s. 6 Q. And this is purely data online, there's no 7 voice on it, as well? 8 A. No, sir, the integrated voice data product 9 has voice bundled into it. The services 10 between the two locations is actually a 11 data circuit in the sense of the word, but 12 it carries both voice and internet 13 traffic -- 14 Q. And -- 15 A. -- in an integrated. 16 Q. Sorry. And you would be referring to, for 17 instance, a T-1 from a KMC collocation 18 site or central office to a customer's 19 premises? 20 A. Yes. 21 Q. And you'd have data coming in on some of 22 those lines and voice coming in and out on 23 some of those lines in T-1? 24 A. Correct. 25 Q. Okay. Do you know if KMC has any</p>
<p>Page 7</p> <p>1 leases from BellSouth to provide broadband 2 service? 3 A. Can you define your definition of 4 "broadband"? 5 Q. What is your definition of broadband? 6 A. Broadband is a loose term that's been 7 associated with higher bandwidth traffic 8 of various types. So to accurately answer 9 that, I would have to know specifically 10 what type of broadband you're referring 11 to. 12 Q. Can you identify for me the different 13 types of broadband that you're familiar 14 with? 15 A. All of the different types, probably not. 16 Typically broadband, again, is used for a 17 higher bandwidth traffic, internet 18 traffic. You could loosely associate it 19 with point-to-point traffic, higher 20 bandwidth point-to-point traffic, things 21 like that. 22 Q. What types of internet services does KMC 23 provide on a BellSouth loop? 24 A. We offer an integrated voice and data 25 product. We offer data only products. We</p>	<p>Page 9</p> <p>1 customers -- voice customers that are 2 purchasing BellSouth DSL service? 3 A. No, I wouldn't have any knowledge of that. 4 Q. Are you aware of that? 5 A. No. 6 Q. Are you aware of an service offering that 7 KMC provides that is equivalent to a DSL 8 product? 9 A. We have looked at several DSL products. 10 We do have some customers that have DSL 11 products, not necessarily as a product 12 offering but as a transport means. 13 Q. What do you mean by that? 14 A. In that DSL in BellSouth sense, from what 15 I understand, offers -- in the simplistic 16 term offers voice service and internet 17 service over the same copper pair in a 18 transport means, you look at devices that 19 belong to the company, the ILEC or the 20 CLEC that allow a two-wire loop or a DSL 21 loop to carry larger amounts of traffic. 22 Essentially converts T-1 four-wire circuit 23 to a two-wire circuit, if you will. 24 Q. Would that be like an etherloop or 25 something like that?</p>

<p>Page 10</p> <p>1 A. Could possibly be. We -- KMC doesn't do 2 too much with the etherloops. I believe 3 that's some of the other Petitioners. 4 Q. For those customers that you believe are 5 receiving a DSL product, is that product 6 provisioned by BellSouth? 7 A. It would have to be on a resale side, 8 because KMC directly does not offer DSL as 9 a product. 10 Q. Are you aware of any KMC customer that has 11 KMC voice services but data with another 12 company? 13 A. Provided solely by the other company? 14 Q. Yes. 15 A. Yes. 16 Q. Do you know what percentage of KMC 17 customers have voice only with KMC and 18 data with another company? 19 A. No, I wouldn't. I don't represent -- or 20 I don't have intimate knowledge of all of 21 the company, just my specific region. 22 Q. Do you know what percentage of BellSouth's 23 loops in BellSouth's region contain load 24 coils? 25 A. That would be BellSouth's network. I have</p>	<p>Page 12</p> <p>1 In many cases the database doesn't have 2 much information on the makeup of the 3 loop. 4 Q. Generally, is the length of the loop in 5 the database? 6 A. Generally. 7 Q. Is it your testimony or belief that a loop 8 that is less than 18,000 feet but contains 9 a load coil must be cleansed of that load 10 coil in order to be able to serve or 11 provide for broadband service? 12 A. Can you point me to where you're 13 specifically referring to my testimony? 14 Q. Well, I'm asking your testimony today. 15 A. Okay. 16 Q. All right. Is it your belief that if a 17 loop is less than 18,000 feet, that a load 18 coil has to be removed in order for that 19 loop to be able to provide broadband 20 service? 21 A. I would have to say no in the sense of has 22 to be removed. There's characteristics of 23 where the load coil's physically located 24 that can greatly affect the overall 25 circuit to provide DSL.</p>
<p>Page 11</p> <p>1 no knowledge of that. 2 Q. For those loops that KMC is leasing from 3 BellSouth, do you know what percentage are 4 in excess of 18,000 feet? 5 A. No. 6 Q. Is that something that you look at when 7 you're reviewing a loop? 8 A. If we are allowed access to the 9 information, the makeup of the circuit, 10 how it's engineered, the engineering of 11 it, yes. 12 Q. Is it your testimony that you are not 13 allowed to see the loop makeup information 14 for a loop that you lease? 15 MR. CAMPEN: Objection to the 16 form. 17 Q. You can answer. 18 A. No. 19 Q. So you -- when you're leasing a loop from 20 BellSouth, you have full access to the 21 loop makeup information for that loop; is 22 that correct? 23 A. We have access to the information that's 24 in the database. Is that the full 25 information on the circuit, not always.</p>	<p>Page 13</p> <p>1 Q. Is there any reason -- other reason why 2 KMC would want a load coil removed for a 3 loop that is less than 18,000 feet other 4 than to provide DSL? 5 A. Currently, I cannot think of one. 6 However, there is a potential for new 7 technology that would require that. 8 Q. And could you identify that new 9 technology? 10 A. No, sir, not at this time. However, 11 there's two different types that are in 12 our testimony, the etherloop and the 13 DSL -- the other DSL -- the HDSL product 14 that exceeds 18,000. Given those two 15 examples as well as any other technology 16 that has yet to be developed or is in the 17 process of being developed. 18 Q. Is KMC currently intending to use the 19 etherloop? 20 A. KMC, like the other Petitioners, are 21 always looking at alternative measures to 22 provide service. We have looked at the 23 etherloop, the stage that we're at in 24 that. It has not been deployed yet but we 25 are looking at several alternatives.</p>

4 (Pages 10 to 13)

Page 14

1 Q. What stage are you in regarding the
2 etherloop?
3 A. I can't tell you at this point.
4 Q. Why not?
5 A. That is a different group that's actually
6 handling that process.
7 Q. Do you know if KMC is intending to deploy
8 etherloop -- etherloops during the term
9 of this replacement agreement?
10 A. I can't answer you.
11 Q. Because you don't know?
12 A. Because I don't know.
13 Q. Okay. Do you know if an etherloop would
14 still work even with the existence of a
15 load coil?
16 A. Again, KMC hasn't rolled out the etherloop
17 product, so I can't honestly answer. I
18 can't answer that.
19 Q. Do you know how much on a per customer
20 basis an etherloop would cost for KMC?
21 A. No.
22 Q. And G.HDSL -- is that called Gizdizzle
23 or...
24 A. I've heard several different
25 pronunciations of it.

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1 Q. Okay. Let's just go to G.HDSL.
2 A. Yes.
3 Q. Do you know what I'm talking about?
4 A. I'm familiar with it, yes.
5 Q. Okay. Before we get there, tell me how
6 etherloop works.
7 A. Again, I'm not intimately involved with
8 the testing of that.
9 Q. You don't know how, in theory, it's
10 supposed to work?
11 A. No.
12 Q. What about G.HDSL?
13 A. No. There's -- The basic premise of
14 HDSL, just with further bandwidth, the
15 same as with the different variations of
16 the DSL product; ADSL, HDSL.
17 Q. And I'm going to ask you the same
18 questions as I did about where KMC is in
19 deploying G.HDSL. Would your answers be
20 the same?
21 A. Yes.
22 Q. You don't have any knowledge as to KMC's
23 intent to deploy G.HDSL during the term of
24 the replacement agreement?
25 A. I'm not aware of the business decision

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1 being made yet, correct.
2 Q. Do you know if BellSouth provides DSL
3 service on loops in excess of 18,000 feet?
4 A. No, I would not have that information.
5 Q. Do you know if there are any industry
6 standards regarding when a load coil
7 should be removed to provide DSL service?
8 A. Yes. Typically HDSL or DSL circuits in
9 general require dry circuits, which means
10 all load coils need to be removed or
11 should be removed.
12 Q. Even when the loop is less than 18,000
13 feet?
14 A. Even when the loop is less than 18,000
15 feet.
16 Q. What standard are you referring to?
17 A. Just industry standard.
18 Q. Do you know where I could find such a
19 standard?
20 A. Not off the top of my head, no, I don't
21 know the exact documents.
22 Q. Do you --
23 A. The load coil manufacturers, Charles, I
24 believe is one of them, has information
25 regarding load coils.

Page 17

1 Q. Do you believe that line conditioning that
2 BellSouth performs for its own customers
3 for xDSL service should be the standard
4 that BellSouth performs for KMC?
5 A. As written or based on the testimony, I
6 would have to say no.
7 Q. And why?
8 A. BellSouth decides what type of service
9 that they do in their line conditioning.
10 Q. Do you believe that there are instances
11 where BellSouth believes that line
12 conditioning would not be necessary but
13 KMC would?
14 A. Yes.
15 Q. Can you identify one?
16 A. DSL products, unknown technology, some of
17 the newer technology that's coming out.
18 Typically, BellSouth is further behind in
19 rolling out new technology, whereas the
20 CLECs, again, as I stated before, are
21 always looking for new technology in order
22 to make them a more cost-effective product
23 to compete in the market.
24 Q. Have you reviewed the FCC's definition of
25 line conditioning in the TRO?

<p style="text-align: right;">Page 18</p> <p>1 A. I have looked at it over the course of the 2 negotiations, yes. 3 Q. And do you believe that that is the 4 applicable standard that the Commission 5 should adopt in this proceeding? 6 A. Yes. 7 Q. What's a bridge tap? 8 A. Bridge tap is used to provide multiple 9 presence of a single loop or a single 10 pair, a single circuit in multiple 11 locations. Probably the easiest way to 12 explain it, if you remember the party line 13 days, bridged taps were used extensively 14 in those situations to provide single 15 phone line to multiple household. 16 Q. What are they used for today? 17 A. To provide multiple presence to pedestals, 18 to different locations on the facility. 19 Q. Can you break it down into laymen's terms? 20 A. Again, to provide multiple presence of a 21 copper loop in different locations. 22 Q. So, for instance -- I mean, would it be 23 applicable to a small business that wants 24 to have one loop in a building? Is that 25 how it would work? You just split the</p>	<p style="text-align: right;">Page 20</p> <p>1 mistaken, I believe is how that was. 2 Q Well, what I -- 3 A. Typically it's up to 6,000 feet or to a 4 maximum bridge tap of 6,000 feet. 5 Q. What I understand is, would you agree with 6 me, BellSouth has a three-prong proposal 7 as far as removal of bridge taps, first 8 would be zero to 2,500 feet? 9 A. Uh-huh. 10 Q. Second would be 2,500 to 6,000, and a 11 third would be 6,000 and above, I guess? 12 A Yes. 13 Q. Okay. So you would agree with that 14 characterization of BellSouth's proposal? 15 A That is BellSouth's proposal, yes. 16 Q. And what is your understanding of the 17 charge, if any, that BellSouth would 18 charge for removing a bridge tap in excess 19 of 6,000 feet? 20 A BellSouth's proposal is that that is 21 tariff pricing. 22 Q. I'd like to refer you to Exhibit -- 23 attachment 2, section 2.12.3? I'm sorry, 24 2.12.3. 25 A. All right.</p>
<p style="text-align: right;">Page 19</p> <p>1 loop up at the customer's premises or 2 before that? 3 A. If -- I'm sorry, I -- 4 Q. Sure. Why don't -- I mean, I'm having 5 trouble when you say -- using the word 6 pedestal, what that really means? 7 A. Through equipment -- different types of 8 equipment on the facilities in the field. 9 Q. Do you know what percentage of KMC's loops 10 contain bridge taps in excess of 6,000 11 feet? 12 A. No, I wouldn't have that information. 13 Q. That's not on LMU? 14 A. Again, if the information is present on 15 the LMU, then, yes But, again, not all 16 specifications -- not all of the loop 17 makeup information is present on those 18 documents. 19 Q. Generally, is bridge tap location on -- 20 in LMU? 21 A. If it was entered, yes. 22 Q. Do you know if BellSouth will remove 23 bridge taps in excess of 6,000 feet in 24 order to provide xDSL service? 25 A. Yes, they will, for a charge, if I'm not</p>	<p style="text-align: right;">Page 21</p> <p>1 Q And if you'd look at the BellSouth 2 version, please. Would you agree with me 3 BellSouth will remove bridge taps in 4 excess of 6,000 feet for no additional 5 charge? 6 A. That serve no network purpose on a copper 7 loop, that's between 16 -- I'm sorry, 8 pardon me. Okay. And repeat the 9 question, again. 10 Q. Yes. Would you agree with me that 11 BellSouth will perform -- will remove a 12 bridge tap that is over 6,000 feet at no 13 charge or no additional charge? 14 A. Yes. 15 Q. So there isn't any dispute on that issue, 16 I would presume? 17 A. On that issue... 18 Q. Meaning bridge taps in excess of 6,000 19 feet? 20 A. In excess of 6,000, no. 21 Q. No, there's no dispute or, no, you don't 22 agree with my statement that there is no 23 dispute? 24 A. No, no dispute over 6,000 feet. 25 Q. Okay. Why do you believe that loops</p>

6 (Pages 18 to 21)

<p style="text-align: right;">Page 22</p> <p>1 between zero and -- excuse me, bridge 2 taps between zero and 6,000 feet need to 3 be removed? 4 A. Line degradation. 5 Q. Are you aware of any instance currently 6 where KMC has asked BellSouth to remove a 7 bridge tap that was between zero and 6,000 8 feet? 9 A. Specifically, no. 10 Q. Okay. Are you aware of any service that 11 KMC is currently providing today that 12 requires the removal of a bridge tap 13 between zero and 6,000 feet? 14 A. Yes. 15 Q. What? 16 A. That, again, would be the DSL transport 17 means that I mentioned earlier. 18 Q. Right. And as far as you know, there has 19 been no instance where you've had to ask 20 BellSouth to remove the bridge tap between 21 zero and 6,000 feet to provide that DSL 22 transport? 23 A. I would not have that information, no. 24 Q. Who would? 25 A. That would be the group directly</p>	<p style="text-align: right;">Page 24</p> <p>1 characteristics, again, of bridge taps and 2 what happens when a DSL circuit is put 3 on. It's comparable to a ball against a 4 wall. The DSL circuit, when it 5 communicates between modems, basically 6 sends out the signal to the other modem. 7 A bridge tap basically reflects that 8 signal back. So the closer a bridge tap 9 is to a modem, the more interference it's 10 going to cause with communication between 11 the two modems. 12 Q. Do you believe that that interference 13 would occur regardless of whether 14 BellSouth or KMC owned the loop? 15 A. It has nothing to do with ownership. It 16 has to do with physically where the bridge 17 tap is. 18 Q. So you would agree with me that whether 19 BellSouth owns the loop or KMC owns the 20 loop, under your understanding, if a 21 bridge tap is anywhere on the loop, DSL is 22 not going to work? 23 A. It will be degraded. 24 Q. Degraded? 25 A. Yes.</p>
<p style="text-align: right;">Page 23</p> <p>1 responsible for ordering those circuits. 2 Q. Is it your belief that the existence of a 3 bridge tap between zero and 6,000 feet 4 will preclude KMC from providing DSL 5 transport? 6 A. Yes. 7 Q. And how do you know that? 8 A. The characteristics of a bridge tap and 9 what happens when you try and put a DSL 10 circuit on a bridge tap line or a bridge 11 tap loop. 12 Q. That -- Where the bridge tap exists 13 between zero and 6,000 feet? 14 A. Yes. 15 Q. Okay. But you don't have any specific 16 recollection or knowledge about that 17 actually happening though, do you? 18 A. No. Not specific to orders ordered by 19 KMC. 20 Q. Have you seen any industry standards 21 regarding when bridge taps should be 22 removed to allow for the provisioning of 23 DSL? 24 A. Specific industry standards, no. There is 25 much discussion based on the</p>	<p style="text-align: right;">Page 25</p> <p>1 Q. Okay. Do you know if BellSouth removes 2 bridge taps on loops that are less than 3 6,000 feet? 4 A. Can you define for who, or do you 5 mean for -- 6 Q. For its end users. I'm sorry, for its end 7 users. 8 A. For BellSouth's own customers? 9 Q. Yes. 10 A. I would have no information or no idea 11 what BellSouth does for its own customers. 12 Q. And I believe you said that you're not 13 aware of any current industry standards 14 governing when bridge taps should be 15 removed? 16 A. I could not state specific documents or 17 anything like that. Again, I've read 18 several discussions about it. 19 Q. Where? 20 A. Mainly on the internet. 21 Q. Do you remember which sites? 22 A. No. 23 Q. How long ago did you read these websites? 24 A. Over the past year, probably, as the 25 technology emerges.</p>

7 (Pages 22 to 25)

<p style="text-align: right;">Page 26</p> <p>1 Q. And could you describe this DSL transport 2 offering which you're providing? 3 Again, I apologize for asking you 4 to do it, but I'm not sure I still quite 5 understand it. 6 A. DSL circuit is essentially provisioned 7 over a two-wire loop. In KMC's position, 8 we have markets that we deploy DSL as a 9 transport means to provide higher 10 bandwidth circuits; T-1s, for example, 11 integrated voice and data primarily where 12 we order a DSL or a two-wire circuit. 13 Q. A loop? 14 A. A loop. Put our own DSL equipment on it, 15 and then our own equipment at both the 16 customer location, bring it back to our 17 central office. 18 Q. Would that be a DLC? Your own DSL 19 equipment, what would that be? 20 A. No, it -- essentially, it is DSL modems 21 that are more of a point-to-point 22 configuration. 23 Q. So you're splitting -- somewhere after 24 the purchase of the loop, you're splitting 25 the high-frequency portion of the loop</p>	<p style="text-align: right;">Page 28</p> <p>1 Q. Do you participate in any collaborative 2 between the CLEC industry and BellSouth? 3 A. Can you explain? 4 Q. Yeah. Are you aware of industry 5 collaboratives between CLECs and BellSouth 6 regarding line sharing issues? 7 A. Aware of, yes. 8 Q. Do you participate in those? 9 A. Not personally, no. 10 Q. Does KMC? 11 A. I can't honestly answer that. 12 Q. Are you aware -- 13 A. I cannot answer that. 14 Q. I'm sorry. Are you aware of any decisions 15 that have come out of these collaboratives 16 regarding when BellSouth will perform or 17 remove bridge taps for CLECs? 18 A. Yes. That has been some of the discussion 19 throughout these negotiations. 20 Q. You've learned of that through BellSouth? 21 A. Through these negotiations, yes. 22 Q. From BellSouth? 23 A. Uh-huh. Yes. 24 Q. Independent of what you learn from 25 BellSouth, you're not aware of any</p>
<p style="text-align: right;">Page 27</p> <p>1 with the modem; right? 2 A. We are taking a two-wire loop, using the 3 DSL transport to carry T-1 worth of 4 traffic. 5 Q. You're taking one loop and you're putting 6 T-1 traffic on that one loop? 7 A. Across the DSL. 8 Q. And that's data on the DSL? 9 A. Could be data, could be voice and data, 10 could be voice only. 11 Q. So you're effectively taking one loop and 12 making it act like a T-1? 13 A. Yes. 14 Q. Are you mux-ing it up at any point or 15 is -- 16 A. Explain. 17 Q. Are you digitizing the traffic at any 18 point when you do that? 19 A. Digitizing, yes. 20 Q. Where? When along the continuum of 21 purchasing the loop to getting it to your 22 end users' DSL equipment? 23 A. Essentially, we are digital out of our 24 switch through the transport equipment to 25 the end user.</p>	<p style="text-align: right;">Page 29</p> <p>1 agreement between CLECs and BellSouth 2 regarding your removal of bridge taps? 3 A. No. 4 Q. Would you consider a CFA or a connecting 5 facility assignment to be part or to be 6 the equivalent of an MDF? 7 A. CFA is essentially where the point is that 8 BellSouth in this case is going to tie the 9 service to to get it to KMC's equipment. 10 Q. Uh-huh. So would you consider it to be 11 the equivalent of the main distribution 12 frame? 13 A. It is a tie point and has a presence on 14 the main distribution frame. 15 Q. But it's not -- it's not equal to a main 16 distribution frame, is it? 17 A. Define main distribution frame. There are 18 several different -- 19 Q. Okay. 20 A. -- terminations that are used several 21 different ways throughout telecom. 22 Q. Loop comes in from end-user's premises, 23 comes in to BellSouth's central office, 24 hits the main distribution frame. 25 A. Uh-huh.</p>

8 (Pages 26 to 29)

<p>Page 30</p> <p>1 Q. And when it comes in, it's coming in on 2 DS-1, so it was mux-ed up along the way, 3 all right? It hits the main distribution 4 frame. It's mux-ed down and it's an 5 analog line and it's -- then it's hitting 6 to CFA to your collocation space. Do you 7 follow? 8 A. Uh-huh. 9 Q. All right. In that instance, do you 10 consider the CFA to be the equivalent of 11 an MDF? 12 A. A presence on the MDF, yes. 13 Q. It's the equivalent. Do you know what 14 equivalent means? 15 A. Equivalent, yes. 16 Q. You consider that, the MDF, to be the 17 equivalent of a CFA? 18 A. No. I would have to say no. An MDF is 19 just that, it's a main distribution 20 frame. There are CFAs on the MDF. In 21 collocation applications, we have tie 22 cables that go from our equipment to the 23 MDF. So to say that a CFA is a MDF, no. 24 Q. Now, does KMC currently review the LMU 25 information of another CLEC?</p>	<p>Page 32</p> <p>1 them? 2 A. To ascertain what services could be 3 provided, yes. 4 Q. And the whole purpose of reviewing another 5 carrier's LMU is to try to win that 6 customer? 7 A. To have an understanding of what services 8 we could provide to that customer. 9 Q. And to go, you know, find out what you can 10 provide and then go market to them and 11 then get them? 12 A. To provide them service. 13 Q. Yes. 14 A. Yes. 15 Q. Okay. So you're trying to win a customer 16 away from another CLEC? 17 A. Not necessarily. 18 Q. Well, when would you not be looking at an 19 LMU information of another CLEC without 20 the intention of trying to win that 21 customer? 22 A. To provide alternate service. You can 23 look at disaster recovery situations where 24 single point of failure can kill a 25 company.</p>
<p>Page 31</p> <p>1 A. Currently? 2 Q. Yes. 3 A. No. 4 Q. Does KMC review the LMU information of 5 BellSouth? 6 A. Of a BellSouth customer? 7 Q. Yes. 8 A. If we request that information, yes. 9 Q. Do you consider KMC's LMU information to 10 be proprietary to KMC? 11 A. The LMU information? 12 Q. Yes. 13 A. No. 14 Q. Do you believe that carriers can view your 15 LMU information to ascertain the types of 16 products that you may be offering to a 17 customer? 18 A. Yes. 19 Q. And is that the reason why KMC wants to be 20 able to review the LMU information of 21 another carrier? 22 A. For which reason? 23 Q. To ascertain services that are being 24 provided or could be provided so that they 25 can market to that customer and try to win</p>	<p>Page 33</p> <p>1 Q. So you would be selling duplicity? 2 A. That's a possibility. 3 Q. Any other possibility? 4 A. To try and win the customer, yes. 5 Q. Have you had any discussions with other 6 CLECs as to whether or not they consider 7 their LMU information to be, you know, 8 confidential business information? 9 A. I believe there are other CLECs in this 10 currently, and our testimony is that we 11 would like to see the LMU. 12 Q. Other than Xspedius or NewSouth, have you 13 had any discussions with other CLECs 14 regarding viewing their LMU information? 15 A. No. 16 Q. Do you know what CCP is? 17 A. I've heard of it, yes. 18 Q. What is your understanding of CCP? 19 A. I believe that is the change control 20 process, I believe is what the acronym 21 is. 22 Q. Do you know if KMC's raised this issue 23 with CCP? 24 A. No, I do not. 25 Q. Do you know if KMC is willing to address</p>

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1 this issue in the CCP?
2 A. I can take that back to the company,
3 again, not knowing if it has been done
4 already.
5 Q. Do you know what the current standard is
6 today regarding a carrier's ability to
7 view the LMU information of another CLEC?
8 A. Have reviewed, but can't -- don't
9 remember exactly as phrased.
10 Q. Do you know if an LOA is required
11 currently?
12 A. To view an LMU?
13 Q. Of another CLEC, yeah.
14 A. In the case of a shared loop, yes.
15 Q. Let me try to -- I'm not trying to be
16 cute, so let me just get to the nut.
17 Does KMC attempt to seek the LMU
18 information of another CLEC today?
19 A. Yes.
20 Q. When?
21 A. Again, as stated earlier, if we're looking
22 to provide alternate service or we're
23 looking to win the customer over.
24 Q. So you -- do you obtain an LOA from the
25 CLEC today in order to view their LMU?

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1 A. No
2 Q. Then how do you view their LMU?
3 A. Requesting it through BellSouth. Again,
4 that's -- that would be with BellSouth
5 customers.
6 Q. Right. This dispute is with CLEC to CLEC?
7 A. Right, looking at other CLEC's.
8 Q. Right. So am I correct --
9 A. The case I'm thinking of is with BellSouth
10 customers.
11 Q. Right.
12 A. So another CLEC, I would have to say no.
13 Q. Okay. So you have never -- well, I
14 shouldn't say never.
15 Are you aware of any instance
16 where KMC has requested an LOA from a CLEC
17 to view their LMU?
18 A. I would have to say no.
19 Q. Are you aware of any CLEC requesting KMC
20 to execute an LOA to view your LMU?
21 A. No, I wouldn't have that information
22 Again, that would be through the order
23 processing group.
24 Q. KMC is also a wholesale provider, correct?
25 A. Correct.

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1 Q. And there are instances where KMC, on its
2 own network, provides the last mile to a
3 customer; is that right?
4 A. Correct.
5 Q. And that's a fiber network?
6 A. It varies.
7 Q. Could it be copper?
8 A. It very well could be copper.
9 Q. Do you resell those loops or those
10 facilities?
11 A. Explain.
12 Q. Do you, on a wholesale basis, resell a
13 loop to other carriers?
14 A. I'm not sure on that.
15 Q. Well, what services do you provide on a
16 wholesale basis as to your network?
17 A. Some of the port wholesaling through other
18 carriers. The wholesale department is
19 completely another division of the
20 company, so I apologize, I'm not up on all
21 of their products. I know port
22 wholesaling is one of the main ones.
23 Q. Do you know if KMC allows a competitor of
24 its current customer to view the technical
25 specifications of the facilities that are

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1 serving your retail customer?
2 A. No, I'm not familiar.
3 Q. Is KMC engaged in line splitting?
4 A. No.
5 Q. Would it be fair to say that today KMC
6 does not view the LMU information of
7 another CLEC's loop in order to ascertain
8 the types of services that could be
9 provided on that loop?
10 A. Yes.
11 Q. You've testified about CNAM dipping; is
12 that right?
13 A. Yes.
14 Q. What is your understanding of CNAM
15 dipping?
16 A. It is a dip into the database to pull up
17 the listed name and number or name
18 information associated with a specific
19 number.
20 Q. Okay. I'd like for you to draw for me a
21 call flue on here explaining, if you can,
22 who makes the dip and when. Would that be
23 possible?
24 A. I could probably articulate it a little
25 bit better.

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1 Q I like pictures.
2 MR. MEZA: And we'll mark it as an
3 exhibit, Henry.
4 MR. CAMPEN: Yeah.
5 MR. MEZA: Okay.
6 Q. And what I'm specifically looking for is
7 Caller A -- and you pick the carrier.
8 Sometimes I like to put the carrier versus
9 a letter, so somebody calls somebody
10 that's got Caller ID.
11 A. Cross-carrier, I assume.
12 Q. What do you mean cross-carrier? What do
13 you mean by that?
14 A. KMC customer to BellSouth --
15 Q. Yes.
16 A. -- or BellSouth to KMC.
17 Q. Yes, absolutely,
18 A. Very simplistic. Actually, I should
19 probably start it so it goes right to
20 left. And eliminating all of the
21 transport equipment in between, call is
22 placed from the KMC switch from the
23 customer. KMC customer to a BellSouth
24 customer. When that call arrives into the
25 BellSouth switch, the BellSouth switch

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1 does the dip into the database.
2 Q. And where is the database?
3 A. It depends on which service BellSouth is
4 using.
5 Q. Is the switch, the BellSouth switch
6 programmed to ascertain or make -- to
7 find out where the information is stored,
8 or does it automatically only go to
9 certain databases?
10 A. There's -- Where the actual programming
11 is that tells the switch to go to a
12 specific database, I'm not sure, but that
13 is -- yes, there's a setup with a
14 warehousing company that has the name
15 information. That is set up so that any
16 call coming into a switch is then routed
17 to that database to do the dip. That
18 database then returns the name that it has
19 on file that -- associated with that
20 specific number, delivers it back to the
21 switch. The switch then passes that along
22 to the customer.
23 Q. Okay. Now, on the bottom of that, do you
24 recall -- and put an arrow so we know the
25 call is coming this way. There we go.

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1 Now, if you could somewhere else
2 on this page do the reverse, a BellSouth
3 to KMC call -- caller with KMC caller
4 having Caller ID.
5 A. It would be the same picture but the
6 name's different.
7 Q. Okay. Let's take the BellSouth
8 originating call for a second. In this
9 instance, when it hits the KMC switch, do
10 you know what databases the KMC switch is
11 querying?
12 A. Yes.
13 Q. Do you know how many databases it queries?
14 A. Just one database, I believe.
15 Q. And do you know what one it is?
16 A. Not off the top of my head, no. I
17 apologize.
18 Q. It's okay. And do you know what
19 companies' information are stored in that
20 database?
21 A. The -- Exactly, no.
22 Q. So if BellSouth's information is not
23 stored in the database that KMC has
24 queried, will the KMC end user receive
25 Caller ID information?

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1 A. No.
2 Q. Okay. Now.
3 MR. CAMPEN: Mr. Meza, just to
4 clarify the document, I might just ask if
5 this is true and suggest, as I understood
6 his testimony, the call came to the
7 BellSouth switch, went up to the database
8 and then back down to the caller?
9 MR. MEZA: That's right.
10 MR. CAMPEN: Maybe an arrow up --
11 MR. MEZA: Sure.
12 MR. CAMPEN: -- one side and an
13 arrow back down?
14 MR. MEZA: That would be fine.
15 Q. Do you know if KMC stores its name in the
16 BellSouth database?
17 A. No, I wouldn't know that.
18 Q. You don't know, okay. What about Sprint
19 United?
20 A. I wouldn't.
21 Q. VeriSign.
22 A. VeriSign I believe is one that we either
23 use or have used in the past.
24 Q. And do you know if the way that names are
25 stored, if only a certain percentage of

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1 names are stored with a specific company
2 or are all your names stored in all the
3 companies that you subscribe to? I mean,
4 do you know particularly how that works?
5 A. No.
6 Q. Do you know how many CNAM database
7 providers there are?
8 A. No.
9 Q. Is it your intention with this issue to
10 make BellSouth contract with every single
11 CNAM database provider?
12 A. No.
13 Q. Does KMC contract with every single CNAM
14 database provider?
15 A. No.
16 Q. Do you believe it is acceptable in some
17 instances where a KMC end user, who does
18 not have Caller ID, doesn't receive all
19 the information in a call in Caller ID?
20 A. If the customer doesn't have Caller ID, he
21 wouldn't receive any information.
22 Q. If the customer does have Caller ID, do
23 you believe that there may be instances
24 where the information may not show up
25 because KMC doesn't have a contract with

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1 the originating -- with the company
2 that's holding the originating carrier --
3 the originating customer's information?
4 A. I'm sorry, one more time.
5 Q. Sure. Sorry. Do you think there are --
6 may be instances -- let's take the
7 originating call, is from Alaska; okay?
8 A. From another carrier?
9 Q. Another carrier. Comes in and terminates
10 to a KMC end user. Do you think that that
11 type of call should result in Caller ID
12 information showing up for the KMC end
13 user?
14 A. If that information is in the database,
15 yes, it would show up.
16 Q. Okay. Is it your belief that all
17 information is stored in the KMC database
18 to which it subscribes to?
19 A. I would have to say no. All is a very
20 inclusive word.
21 MR. MEZA: Let's mark that as 30.
22 (DEPOSITION EXHIBIT NO. 30 WAS MARKED.)
23 MR. CAMPEN: Off the record.
24 MR. MEZA: I'm done.
25 Mr. Culpepper may have some

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1 questions for you to issues on attachment
2 6.
3 BY MR. CULPEPPER:
4 Q. Good afternoon, Mr. Collins. I'm Robert
5 Culpepper, and I also represent
6 BellSouth. And let's turn to attachment
7 6, issue 86B, unauthorized access to CSR
8 information.
9 MR. CAMPEN: Can you give us a
10 section reference, Robert?
11 MR. CULPEPPER: 2.5.5.3. It may
12 be on page 7 of attachment 6.
13 A. 2.5.5.3?
14 Q. Yeah. Tell me, Mr. Collins, do you know
15 what CSR information is?
16 A. Yes, sir.
17 Q. Can you -- What's your understanding of
18 CSR information?
19 A. That is the customer service record that
20 contains the specific configuration of the
21 particular customer.
22 Q. And let's take a look at the Joint
23 Petitioners' language at 2.5.5.3. And
24 could you take a -- take some time and
25 just read the bold version of the customer

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1 short name version. And you understand
2 that's the language the Joint Petitioners
3 are proposing?
4 A. Yes.
5 Q. Take a look at the second bolded sentence,
6 the one that starts, if the receiving
7 party fails to provide the other party
8 with notice.
9 A. Is that the BellSouth version?
10 Q. No. Huh-uh. I'm asking about Joint
11 Petitioners' version.
12 A. The second bolded?
13 Q. Yeah, there's first -- there's bolded --
14 the first two lines are bolded.
15 And my question is, after you take
16 a look at it, tell me what is a reasonable
17 period of time for one party to provide
18 the other party with proof sufficient to
19 persuade the other party that it erred in
20 asserting noncompliance?
21 A. Reasonable would mean an amount of time
22 appropriate enough to research the
23 situation and discover all of the facts
24 involved.
25 Q. How long of a period of time would that

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1 be?
2 A. It would have to depend on the depth of
3 research that is involved.
4 Q. How much research, in your opinion, would
5 be involved to determine whether or not
6 there's been some unauthorized access to
7 CSR information?
8 A. I would have to speculate. It would,
9 again, be specific to the instance.
10 Q. Would it take 30 days?
11 A. It could possibly --
12 MR. CAMPEN: Objection. Asked and
13 answered.
14 Q. You can answer the question.
15 A. It could take 30 days, yes. Again,
16 that's -- I would have to speculate.
17 Q. Do you have any first-hand knowledge of an
18 inquiry into whether or not there have
19 been unauthorized access to CSR
20 information?
21 A. No.
22 Q. So it's fair to say that you can't tell me
23 today -- sitting here today how long a
24 reasonable period of time would be to
25 investigate the matter?

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1 MR. CAMPEN: Objection as to form.
2 A. No.
3 Q. Now, tell me why is it that the party,
4 which believes there has been some
5 unauthorized access to CSR information, is
6 required to assert a dispute resolution
7 provision under the contract?
8 A. To assure that the handle -- or the
9 situation is handled correctly and that
10 the offending party is afforded all the
11 information, all the details associated
12 with the specific incident so that it can
13 be investigated and that it's accomplished
14 through a common means already set in
15 place.
16 Q. And when you say "offending party", which
17 party are you referring to?
18 A. The party who -- for example, BellSouth
19 came to KMC. KMC would then be the
20 offending party in trying to get the CSR
21 information or with the CSR violation.
22 Q. Take a look at the BellSouth version of
23 the same section 2.5.5.3. And that starts
24 at the bottom of that page 7 --
25 A. Yes, sir.

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1 Q. -- and goes on to page 8. And just review
2 it for me, if you will.
3 (PAUSE.)
4 Q. Have you had a chance to look at it?
5 A. Yes.
6 Q. Tell me what parts of the BellSouth
7 version, if any, that you find ambiguous?
8 A. The termination of access was one part,
9 may discontinue provisioning of existing
10 services.
11 Q. Tell me where the termination of access
12 part is you're referring to.
13 A. The -- Page 8, fourth line down. May
14 terminate the provision of access to
15 ordering system to the party and may
16 discontinue the provisioning of existing
17 services.
18 Q. And then go on. If such -- If such use
19 is not corrected or ceased by the tenth
20 calendar day following the date of the
21 initial notice, is that the part you're
22 reading from?
23 A. Yes.
24 Q. Tell me what's ambiguous about that.
25 Isn't it setting forth a specific time

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1 frame under which corrective action
2 can --
3 A. Yes.
4 Q. -- be taken?
5 A. It does.
6 Q. So tell me what's ambiguous.
7 A. That portion is clear.
8 Q. Is there some other portion that you think
9 may be ambiguous?
10 A. And, I'm sorry, I see where I was
11 confused. On page 7.
12 Q. On the BellSouth version?
13 A. Yes.
14 Q. Okay.
15 A. If you will allow me a moment again.
16 Q. Sure.
17 A. I'm trying to regain my train of thought
18 on this.
19 Q. Okay.
20 A. Ambiguous, no. The concern with this was
21 the fifth calendar day and the tenth
22 calendar day.
23 Q. Would the concern be alleviated if those
24 dates -- those time frames were something
25 different?

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1 A. That would have to go back to the
2 Petitioners. I could not make that
3 assumption solo.
4 Q. Has KMC had any dispute with BellSouth
5 regarding unauthorized access to CSR
6 information?
7 A. I can't answer that. Not to my knowledge.
8 Q. Does KMC have similar provisions in its
9 tariffs or in its contracts?
10 A. Again, I'm not familiar with -- that
11 familiar with the tariffs and provisions.
12 Q. Page 93 of the direct testimony, which
13 is -- is that Exhibit 1?
14 A. 93?
15 Q. Yes, sir.
16 A. Yes, sir.
17 Q. How about, if you would, just review lines
18 5 through 11, which is the answer to the
19 question, what is the rationale for your
20 position.
21 A. Yes, sir.
22 Q. Tell me what's meant by your statement
23 that BellSouth is truly concerned about
24 resolving issues such as unauthorized CSR
25 information -- and I'm paraphrasing a

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1 little bit. It should not continue to
2 impose including a court of law as an
3 appropriate venue for dispute resolution?
4 A. Just what it says in there, that that
5 would be an option. With the self-help,
6 it means immediate action, that service
7 would be -- could possibly be -- I'm
8 sorry, that it should involve up to a
9 court of law as part of the resolution
10 process. Just as it's stated in the
11 testimony.
12 Q. Is it your testimony that a state
13 commission couldn't just as easily resolve
14 the same type of dispute?
15 A. I'm sorry, could you show me where that's
16 at in the testimony?
17 Q. I'm asking about your testimony. And as I
18 read this testimony, you're suggesting
19 that a dispute over CSR information is
20 more readily resolved in a court of law.
21 Now, it's your testimony -- tell me if I'm
22 reading it wrong.
23 MR. CAMPEN: Objection to the form
24 of the question. I believe you're
25 mischaracterizing what is written.

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1 A. The intent behind this is to prevent the
2 termination of service into receiving the
3 CSRs. By taking this to a court of law,
4 it provides the avenue to dispute the
5 resolution and come to an understanding or
6 to a resolution, whereas disconnecting
7 service or suspending service into CSRs
8 has an adverse effect into the company by
9 taking that venue to a court of law or up
10 to a court of law if it cannot be resolved
11 beforehand.
12 Q. Couldn't the parties take it to a
13 commission for resolution just as well?
14 A. That, I'm not sure of.
15 Q. Let's go to issue 88. That's one of your
16 issues, isn't it, Mr. Collins?
17 A. I would actually have to look at the --
18 Q. The rate for a service X backcharge.
19 A. Which issue, I'm sorry?
20 Q. 88 or 6/5.
21 A. Yes.
22 Q. That's your issue; right?
23 A. Yes.
24 Q. What's the basis for your position that a
25 service expedite charge should be priced

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1 in accordance with TELRIC pricing
2 standards?
3 A. It involves a UNE. I mean, essentially
4 you're talking the expedited install of a
5 UNE service, which UNEs are covered under
6 251, which would, therefore, be TELRIC
7 pricing.
8 Q. So it's your testimony that the basis for
9 your position is Section 251 of the
10 Telecom Act?
11 A. The testimony is that the pricing should
12 be set consistent with TELRIC pricing.
13 Q. Understood. I'm asking you, can you give
14 me any authority for the position stated
15 in your testimony?
16 A. I'm sorry, give you authority?
17 Q. Well, such as a state commission order or
18 federal order or some other authority that
19 says, hey, BellSouth, you have an
20 obligation to price a service expedite in
21 association with the UNE order at TELRIC.
22 That's what I'm talking about.
23 A. It is our stance that expedites involve
24 nothing outside of normal provisioning for
25 UNE services.

<p>Page 54</p> <p>1 And based on that, UNEs are 2 covered under -- I believe it's under the 3 251, that shows that TELRIC pricing for a 4 normal UNE install circuits, this is 5 expedite charge, and would follow that 6 same principle. 7 Q. So a service expedite, in your opinion, is 8 a normal part of provisioning? 9 A. No, it's not a normal part of 10 provisioning. It's a request for an 11 expedited install. There is -- There's 12 no difference in the provisioning itself 13 -- the physical provisioning of the UNE 14 circuit that differs. It is merely -- 15 It's a request for an expedited install. 16 Q. Does KMC expedite orders for its 17 customers? 18 A. Yes, we do. 19 Q. Does KMC charge its customers for 20 those -- for orders that it expedites? 21 A. Yes, we do. 22 Q. Does KMC charge its customers TELRIC-based 23 service expedite charges? 24 A. The exact charges, I'm not sure of on the 25 KMC side. That's actually handled through</p>	<p>Page 56</p> <p>1 apply? 2 A. Was it a requested early install? 3 Q. Yeah. A requested early install. 4 A. It's -- KMC requested the early install, 5 is what you mean? 6 Q. Yes. 7 A. And that service was installed early? 8 Q. Correct. 9 A. Again, that is a position that we are 10 taking in here that that would be in line 11 and consistent with the TELRIC pricing. 12 Q. To your knowledge, has any state 13 commission established TELRIC-based 14 service expedite charge? 15 A. No, I wouldn't. 16 Q. Do you know why they haven't? 17 A. No. 18 Q. Did any CLEC ask for it? 19 A. I wouldn't know. 20 Q. Mr. Collins, let's assume that KMC puts in 21 a service expedite charge for the 22 provisioning of a UNE loop; okay? 23 A. Service expedite request. 24 Q. Yeah. And BellSouth provisions that loop 25 in an expedited basis; okay? Are you with</p>
<p>Page 55</p> <p>1 the billing. 2 Q. Tell me, what is the purpose of service 3 intervals? 4 A. To provide a -- what is the term I'm 5 looking for -- a metrics, if you will, or 6 to provide a standard in which services 7 are installed that is predictable. 8 Q. Does KMC have service intervals? 9 A. Yes, we do. 10 Q. Does KMC -- strike that. 11 Mr. Collins, if KMC places an 12 order for UNE provisioning and that order 13 is provisioned within the standard 14 interval, what charges apply? 15 A. The exact charges, I'm not sure. Again, 16 that's handled through the billing 17 department. I'm not intimately familiar 18 with the exact charges. 19 Q. It would be whatever the applicable UNE or 20 TELRIC-based charge would be; correct? 21 A. That's my understanding, yes. 22 Q. Now, if KMC placed an order -- another UNE 23 order and -- at that interval and it was 24 completed in half that time, in half the 25 standard interval, what charge should</p>	<p>Page 57</p> <p>1 me? 2 A. Yes, sir. 3 Q. Let's assume that by putting a priority on 4 the KMC service request that BellSouth 5 then fails to meet the state UNE service 6 request of another CLEC; okay? Are you 7 with me? 8 A. Yes, sir. 9 Q. Now, assume for me that that missed 10 service interval on a second CLEC causes 11 BellSouth to incur a penalty known as a 12 SEEM penalty and causes BellSouth to pay 13 its SEEM penalty to that second CLEC. Are 14 you with me? 15 A. Yes, sir. 16 Q. Would KMC, in that instance, agree to 17 reimburse BellSouth the SEEM penalty it 18 paid to another CLEC in order to meet the 19 KMC service expedite request? 20 MR. CAMPEN: Object to the form of 21 the question. 22 A. I cannot answer that. Giving how 23 BellSouth handles the expedite installs, 24 they have refused an expedite and -- 25 excuse me, let me rephrase that, not</p>

15 (Pages 54 to 57)

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1 refused, but have come back and said that
2 an expedite was unavailable, that they
3 could not expedite the charge, that the
4 best date they could do was the one that
5 was provided, I would think that given
6 that scenario, that BellSouth, knowing
7 their workload, would not accept an
8 expedite on one to miss another and incur
9 a SEEMs penalty.
10 Q. With respect to having a choice -- maybe
11 that's the wrong term.
12 Does -- KMC, do they have the
13 option of refusing an expedite request of
14 its customer or declining it, if you will?
15 A. The option, yes.
16 MR. CULPEPPER: Can we go off the
17 record?
18 MR. CAMPEN: Sure.
19 (SHORT RECESS.)
20 BY MR. CULPEPPER:
21 Q. Mr. Hollins, what happens when KMC makes a
22 service expedite request on BellSouth and
23 BellSouth is unable to meet that request?
24 A. As far as what does KMC do?
25 Q. Uh-huh.

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1 A. We attempt to work with BellSouth to see
2 if we can't get an expedite in at that
3 time. If there's no way, then we're
4 forced to look at possibly providing
5 alternative service in the case of a
6 customer move, for example, or in the case
7 of a customer being provided by
8 service -- by a carrier who's going out
9 of business and who has a drop dead time
10 as to when they're shutting their service
11 down. If that -- If the request that was
12 submitted to BellSouth cannot be submitted
13 in time, then KMC has to look at
14 alternative measures to provide service to
15 that customer to keep from impacting them.
16 Q. So, in short, BellSouth -- you understand
17 that BellSouth has no obligation to meet
18 the service expedite request?
19 A. Yes.
20 MR. CULPEPPER: I have no further
21 questions.
22 MR. MEZA: We're done.
23 (THE DEPOSITION CONCLUDED AT 4:11 P.M.)
24
25

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1 ERRATA SHEET
2
3 Case name: In the Matter of
4
5 Joint Petition NewSouth
6 Communications for
7 Arbitration with BellSouth
8
9 Deponent: Robert Collins
10
11 Date:
12
13 PAGE LINE READS SHOULD READ
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1 SIGNATURE
2 I, Robert Collins, do hereby state under
3 oath that I have read the above and
4 foregoing deposition in its entirety and
5 that the same is a full, true and correct
6 transcript of my testimony.
7 Signature is subject to corrections on
8 attached errata sheet, if any.
9
10 Robert Collins
11
12 State of
13
14 County of
15
16 Sworn to and subscribed before me this
17 day of , 20 .
18
19 Notary Public
20
21 My commission expires:
22
23
24
25

1 CERTIFICATE
2 State of North Carolina
3 County of Harnett
4
5 I, Nicole Ball Fleming, a notary public in
6 and for the State of North Carolina, do
7 hereby certify that there came before me
8 on the 17th day of December, 2004, the
9 person hereinbefore named, who was by me
10 duly sworn to testify to the truth and
11 nothing but the truth of his knowledge
12 concerning the matters in controversy in
13 this cause; that the witness was thereupon
14 examined under oath, the examination
15 reduced to typewriting by myself, and the
16 deposition is a true and accurate
17 transcription of the testimony given by
18 the witness.
19 I further certify that I am not counsel
20 for, nor in the employment of any of the
21 parties to this action, that I am not
22 related by blood or marriage to any of the
23 parties, nor am I interested, either
24 directly or indirectly, in the results of
25 this action.
In witness whereof, I have hereto set my
hand and affixed my official notarial
seal, this the 31st day of December,
2004
Nicole Ball Fleming
Notary Public
My commission expires 4/30/05

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BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-772, Sub 8
Docket No. P-913, Sub 5
Docket No. P-989, Sub 3
Docket No. P-824, Sub 6
Docket No. P-1202, Sub 4

COPY

In the Matter of)
)
Joint Petition NewSouth)
Communications Corp., et al. for)
Arbitration with BellSouth)
Telecommunications, Inc.)

Raleigh, North Carolina
Tuesday, December 14, 2004
Volume I
Deposition of HAMILTON RUSSELL,

a witness herein, called for examination by
counsel for the Joint Petitioners, in the
above-entitled action, pursuant to Notice, the
witness being duly sworn by Sarah K. Mills,
Court Reporter and Notary Public in and for the
State of North Carolina, taken at the Offices of
Parker Poe Adams & Bernstein, 150 Fayetteville
Street Mall, Suite 1400, Raleigh, North
Carolina, beginning at 2:30 p.m., on Tuesday,
December 14, 2004, such proceedings being taken
stenographically by Sarah K. Mills.

<div>Page 2</div> <div>1 APPEARANCES OF COUNSEL</div> <div>2</div> <div>3 On behalf of the Joint Petitioners</div> <div>4 Henry C. Campen, Jr</div> <div>5 Parker Poe Adams & Bernstein, LLP</div> <div>6 1400 Wachovia Capitol Center</div> <div>7 Raleigh, NC 27602-0389</div> <div>8</div> <div>9 John J. Heitmann</div> <div>10 Garret R. Hargrave</div> <div>11 Kelley Drye & Warren</div> <div>12 1200 19th Street, NW</div> <div>13 Suite 500</div> <div>14 Washington, DC 20036</div> <div>15</div> <div>16 On behalf of BellSouth</div> <div>17</div> <div>18 Jim Meza</div> <div>19 Robert A. Culpepper</div> <div>20 BellSouth Legal Department</div> <div>21 675 West Peachtree Street, NE</div> <div>22 Suite 4300</div> <div>23 Atlanta, GA 30375</div> <div>24</div> <div>25</div>	<div>Page 4</div> <div>1 STIPULATIONS</div> <div>2 Before testimony was taken, it was</div> <div>3 stipulated by and between counsel representing</div> <div>4 the respective parties as follows.</div> <div>5</div> <div>6 1. That any defect in the notice of the</div> <div>7 taking of this deposition, either as to time or</div> <div>8 place, or otherwise as required by statute is</div> <div>9 expressly waived, and this deposition shall have</div> <div>10 the same effect as if formal notice in all</div> <div>11 respects as required by statute had been given</div> <div>12 and served upon the counsel in the manner</div> <div>13 prescribed by law.</div> <div>14 2. That this deposition shall be taken for</div> <div>15 the purpose of discovery or for use as evidence</div> <div>16 in the above-entitled action, or for both</div> <div>17 purposes.</div> <div>18</div> <div>19 3. That this deposition is deemed opened</div> <div>20 and all formalities and requirements with</div> <div>21 respect to the opening of the same, expressly</div> <div>22 including notice of the opening of this</div> <div>23 deposition, are hereby waived, and this</div> <div>24 deposition shall have the same effect as if all</div> <div>25 formalities in respect to the opening of the</div> <div>same had been complied with in detail.</div> <div>4 That the undersigned, Sarah K. Mills, a</div> <div>Notary Public is duly qualified and constituted</div> <div>to take this deposition.</div> <div>5 Objections to questions, except as to</div> <div>the form thereof, and motions to strike answers</div> <div>need not be made during the taking of the</div> <div>deposition, but may be reserved until any</div> <div>pretrial hearing held before any judge of any</div> <div>court of competent jurisdiction for the purpose</div> <div>of ruling thereon, or at any other hearing or</div> <div>trial of said case at which said deposition</div> <div>might be used, except that an objection as to</div> <div>the form of a question must be made at the time</div> <div>such a question is asked or objection is waived</div> <div>as to the form of the question.</div> <div>6. That the North Carolina Rules of Civil</div> <div>Procedure shall control concerning the use of</div> <div>the deposition in court.</div>
<div>Page 3</div> <div>1 INDEX TO EXAMINATIONS & EXHIBITS</div> <div>2</div> <div>3 Examination Page</div> <div>4</div> <div>5 Direct by Mr. Meza 5</div> <div>6</div> <div>7 ---</div> <div>8</div> <div>9 Deposition Exhibit Page</div> <div>10 NO. 5 Joint Petitioners' Exhibit A . . . 41</div> <div>11 NO. 6 Request for Production 46</div> <div>12 NO. 7 Service Exhibit T Local Access,</div> <div>13 Wholesale Services Agreement . . . 46</div> <div>14 NO. 8 Petitioner's Response to Request</div> <div>15 for Production No. 14 50</div> <div>16 NO. 9 Produced for Request for</div> <div>17 Production No. 14, MBX 00027-00030 50</div> <div>18 NO. 10 Response to Interrogatories . . . 68</div> <div>19 NO. 11 Joint Petitioners' Response to</div> <div>20 BellSouth's Request for</div> <div>21 Production No. 11 75</div> <div>22 NO. 12 NuVox Response to Production No. 13 76</div> <div>23 NO. 13 Agreement, General Terms and</div> <div>24 Conditions 97</div> <div>25</div>	<div>Page 5</div> <div>1 PROCEEDINGS</div> <div>2 * * * * *</div> <div>3 Whereupon,</div> <div>4 HAMILTON RUSSELL,</div> <div>5 having been duly sworn, testified as follows:</div> <div>6 EXAMINATION</div> <div>7 BY MR. MEZA:</div> <div>8 Q. Good afternoon, Mr. Russell. My name</div> <div>9 is Jim Meza. I'm a lawyer for BellSouth. We're</div> <div>10 here to depose you in the context of an</div> <div>11 arbitration proceeding that our various</div> <div>12 companies have between each other. Have you</div> <div>13 been deposed before?</div> <div>14 A. Yes.</div> <div>15 Q. And I understand you're a lawyer?</div> <div>16 A. Yes.</div> <div>17 Q. So is it fair to assume that I don't</div> <div>18 need to instruct you on how a deposition should</div> <div>19 proceed?</div> <div>20 A. That's fine.</div> <div>21 Q. What's your current job title, sir?</div> <div>22 A. Current job title is Vice President of</div> <div>23 Regulatory Affairs for NuVox Communications,</div> <div>24 Inc.</div> <div>25 Q. In your duties do you provide counsel</div>

<p style="text-align: right;">Page 6</p> <p>1 to NuVox?</p> <p>2 A. Yes.</p> <p>3 Q. So do you consider yourself a lawyer</p> <p>4 for NuVox?</p> <p>5 A. Yes.</p> <p>6 Q. Are you appearing as a lawyer today?</p> <p>7 A. Appearing as a witness. I am also a</p> <p>8 lawyer by trade.</p> <p>9 Q. As a witness, are you -- do you</p> <p>10 consider yourself a policy witness?</p> <p>11 A. The testimony that I'm providing</p> <p>12 involves policy issues; however, my primary</p> <p>13 position with the company isn't -- is to assist</p> <p>14 with policy issues; however, that's not my</p> <p>15 everyday job role.</p> <p>16 Q. Do you believe a policy witness should</p> <p>17 have facts to support their testimony?</p> <p>18 A. In some instances, yes, but in others</p> <p>19 to testify based on their experience and as it</p> <p>20 would apply to issues of policy.</p> <p>21 Q. Now, as -- I think you said director</p> <p>22 or vice president of regulatory; is that right?</p> <p>23 A. That's right.</p> <p>24 Q. Do you have specific segments of the</p> <p>25 business that you're responsible for?</p>	<p style="text-align: right;">Page 8</p> <p>1 A. Not necessarily.</p> <p>2 Q. Are there other people at NuVox who</p> <p>3 would approve a revision to a NuVox tariff</p> <p>4 related to the potential exposure NuVox may have</p> <p>5 in providing service to a customer?</p> <p>6 A. Yes.</p> <p>7 Q. Who is that?</p> <p>8 A. Ed Caduke.</p> <p>9 Q. What is his position?</p> <p>10 A. He is Vice President of Regulatory</p> <p>11 Affairs.</p> <p>12 Q. Is he also a lawyer?</p> <p>13 A. Yes.</p> <p>14 Q. Are you here today speaking on behalf</p> <p>15 of NewSouth and NuVox?</p> <p>16 A. Yes.</p> <p>17 Q. So everything -- well, just make sure</p> <p>18 we're clear. If I refer to one company and not</p> <p>19 the other, I'm using them interchangeably.</p> <p>20 A. That's fine.</p> <p>21 Q. Do you have any expertise in network</p> <p>22 issues?</p> <p>23 A. In terms of learning the business over</p> <p>24 the past seven years, I'm familiar with network</p> <p>25 issues. I would not say that I'm an expert with</p>
<p style="text-align: right;">Page 7</p> <p>1 A. Yes</p> <p>2 Q. What are they?</p> <p>3 A. I handle company corporate issues,</p> <p>4 contracts, some state regulatory work. Work</p> <p>5 with certain RBOCs, including BellSouth, among</p> <p>6 other things</p> <p>7 Q. What is a company corporate issue?</p> <p>8 A. Setting up a company option plan.</p> <p>9 Q. Okay, so HR?</p> <p>10 A. Working on corporate development</p> <p>11 Option plan is not necessarily HR. It's more of</p> <p>12 a benefits issue.</p> <p>13 Q. Do you have any role in the</p> <p>14 formulation or revision of NuVox's tariffs?</p> <p>15 A. To some degree, yes.</p> <p>16 Q. And what degree is that?</p> <p>17 A. The lady who actually files NuVox's</p> <p>18 tariff changes is a paralegal by the name of</p> <p>19 Mary Campbell. She works for me.</p> <p>20 Q. Do you approve all the changes that</p> <p>21 she submits on behalf of NuVox?</p> <p>22 A. I approve certain changes from time to</p> <p>23 time, as do others.</p> <p>24 Q. Is there a particular type of change</p> <p>25 that would fall under your expertise?</p>	<p style="text-align: right;">Page 9</p> <p>1 regard to network issues.</p> <p>2 Q. What about UNE costs?</p> <p>3 A. I have been involved in UNE cost</p> <p>4 proceedings, and I've looked at prices as</p> <p>5 established by state commissions in terms of</p> <p>6 reviewing our network costs</p> <p>7 Q. Have you ever -- sorry.</p> <p>8 A. I don't necessarily know if I am an</p> <p>9 expert in that regard, but I have reviewed</p> <p>10 network costs from time to time.</p> <p>11 Q. Have you ever reviewed a cost study?</p> <p>12 A. Yes.</p> <p>13 Q. Have you ever performed a cost study?</p> <p>14 A. In what --</p> <p>15 Q. A TELRIC cost study?</p> <p>16 A. What do you mean by performed a TELRIC</p> <p>17 cost study?</p> <p>18 Q. Have you ever analyzed a cost study</p> <p>19 submitted by BellSouth for establishment of a</p> <p>20 UNE cost?</p> <p>21 A. I have looked at cost studies from</p> <p>22 time to time that BellSouth has submitted to a</p> <p>23 state commission.</p> <p>24 Q. Did you review the methodology used by</p> <p>25 BellSouth to come to the derived cost in the</p>

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<p style="text-align: right;">Page 10</p> <p>1 cost study?</p> <p>2 A. I reviewed certain elements that</p> <p>3 BellSouth indicated it had included in a cost</p> <p>4 study -- in the cost study. I cannot recall --</p> <p>5 this is some years ago -- the particular</p> <p>6 elements.</p> <p>7 Q. Are you involved with any product</p> <p>8 development aspect of NuVox?</p> <p>9 A. Yes.</p> <p>10 Q. To what degree?</p> <p>11 A. The legal department provides advice</p> <p>12 on occasion as the sales and marketing</p> <p>13 department develop new products for the company</p> <p>14 to sell to its customers.</p> <p>15 Q. Other than providing legal advice, do</p> <p>16 you actually perform any services relating to</p> <p>17 the development of your products?</p> <p>18 A. In terms of looking at whether the</p> <p>19 company is entitled to and may provide a certain</p> <p>20 service within the parameters of its network</p> <p>21 configuration, et cetera, yes, provide advice on</p> <p>22 product development.</p> <p>23 Q. How long have you been with NuVox?</p> <p>24 A. Since '98 -- early '98.</p> <p>25 Q. Have there been some predecessor</p>	<p style="text-align: right;">Page 12</p> <p>1 year 2000.</p> <p>2 Around that same time, we began</p> <p>3 negotiations, that is State Communications. The</p> <p>4 company's name changed, and the name change may</p> <p>5 have occurred in late '99, to Trivergent</p> <p>6 Communications. In May -- April or May of the</p> <p>7 year 2000, we began talks with Gabriel</p> <p>8 Communications out of St. Louis to merge the two</p> <p>9 companies. The attractiveness there was Gabriel</p> <p>10 was providing service to small business</p> <p>11 customers on their own facilities in the midwest</p> <p>12 in both then the AmeriTech region and in</p> <p>13 SouthWestern Bell. The only state where they</p> <p>14 provided services in the BellSouth area was in</p> <p>15 Kentucky. It seemed like a good fit That</p> <p>16 merger was completed in October of the year</p> <p>17 2000, at which time Trivergent Communications</p> <p>18 was the company that later became NuVox via a</p> <p>19 name change that was precipitated by the merger</p> <p>20 of Trivergent and Gabriel Communications.</p> <p>21 Q. So is it fair to assume that NuVox has</p> <p>22 interconnection agreements with RBOCs other than</p> <p>23 BellSouth?</p> <p>24 A. Yes.</p> <p>25 Q. Which one?</p>
<p style="text-align: right;">Page 11</p> <p>1 companies to NuVox?</p> <p>2 A. Not necessarily predecessor companies.</p> <p>3 State Communications was incorporated in October</p> <p>4 of 1997. Began providing service, I believe, in</p> <p>5 Kentucky in May of 1998. In the first part of</p> <p>6 1998, we were obtaining our local and long</p> <p>7 distance certifications in the nine-state</p> <p>8 BellSouth region, along with some other states.</p> <p>9 The company's initial business plan anticipated</p> <p>10 providing total service resale to residential</p> <p>11 customers and small businesses. We marketed our</p> <p>12 services in -- it staggered through states,</p> <p>13 starting with Kentucky. I can't recall the</p> <p>14 specific order of the states as we began to</p> <p>15 market our services in the BellSouth region.</p> <p>16 But we would sign up a customer, do a change</p> <p>17 as-is order, and then begin providing service to</p> <p>18 the customer through a resale.</p> <p>19 Sometime in early -- no, I'm sorry,</p> <p>20 late 1999, we began looking at deploying our own</p> <p>21 facilities using Nortel switches in anticipation</p> <p>22 of using the Nortel Passport product to provide</p> <p>23 voice and DSL services to small businesses and</p> <p>24 residential customers. We began that network</p> <p>25 deployment, I believe, in second quarter of the</p>	<p style="text-align: right;">Page 13</p> <p>1 A. Cincinnati Bell, SBC. I don't believe</p> <p>2 that we have any interconnection agreements with</p> <p>3 Verizon, but I'm not certain about the midwest.</p> <p>4 Q. Do you have any -- oh, I'm sorry.</p> <p>5 A. NuVox through NewSouth, at this point</p> <p>6 in time still in the name of NewSouth, does have</p> <p>7 an interconnection agreement with Verizon. I</p> <p>8 think that's it.</p> <p>9 Q. Do you have any responsibility for the</p> <p>10 negotiation or implementation of those</p> <p>11 agreements that are not involving BellSouth?</p> <p>12 A. Only in the event that the person who</p> <p>13 is responsible for those is out and I have to</p> <p>14 take up if he's on vacation, but not on a</p> <p>15 day-to-day basis, no.</p> <p>16 Q. Do you know if there's a joint defense</p> <p>17 agreement between the various companies</p> <p>18 participating in this arbitration?</p> <p>19 A. I believe that there is.</p> <p>20 Q. Do you know when it was executed?</p> <p>21 A. Around the time that these</p> <p>22 companies -- and at the time I believe it was</p> <p>23 five companies. It seems there were two</p> <p>24 Xspedius operating companies at the time. I'm</p> <p>25 not sure what their names were. KMC, NewSouth,</p>

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<p style="text-align: right;">Page 14</p> <p>1 and NuVox began discussing the possibility of a 2 joint interconnection agreement negotiation. 3 Q. Is that agreement still in place 4 today? 5 A. I believe so. 6 Q. Do all of these CLECs participating in 7 this arbitration have a unified position on all 8 the issues that remain? 9 A. Yes. 10 Q. Has there ever been a disagreement as 11 to what position each party should take relating 12 to an issue? 13 A. When these companies came together to 14 begin this process, I believe we received a 15 BellSouth template interconnection agreement. 16 This is going back two years now. From time to 17 time, we have discussed every one of these 18 issues including issues that we've settled. I'm 19 certain that the companies have taken different 20 positions, but as we have worked on this over 21 the past two years, we have come to unified 22 positions on all the issues that have not been 23 settled as well as the issues that we've settled 24 with BellSouth. 25 Q. Do you believe that some companies</p>	<p style="text-align: right;">Page 16</p> <p>1 A. I don't believe that because I think 2 that if they're -- at this point, not speaking 3 of past history of interconnection negotiations. 4 I think at this point, maybe if the situation 5 were one carrier and BellSouth, certain issues 6 may have resolved. I don't necessarily believe 7 that there are issues that are still, 8 quote/unquote, at issue because three carriers 9 are involved. 10 Q. Is any third party helping the company 11 paying attorney's fees? 12 A. No. 13 Q. And is it pro rata share of fees and 14 costs? 15 A. When we initially started this, it was 16 divided among the carriers equally. Now that -- 17 and it is still that way. We started out with 18 five carriers. 19 Q. Right. 20 A. I believe that because the Xspedius 21 consolidation was underway, Xspedius took one 22 share so that the bills or costs associated with 23 this arbitration were split up four ways. Since 24 the NuVox/NewSouth merger was announced in May, 25 there are three shares.</p>
<p style="text-align: right;">Page 15</p> <p>1 feel stronger about certain issues? 2 A. I can't speak for Xspedius or KMC, but 3 it would only be natural that their management 4 teams and the people that are acting on their 5 behalf feel more strongly about certain issues 6 than others, and more strongly about issues than 7 maybe NuVox does. 8 Q. What issues does NuVox feel strongly 9 about? 10 A. I haven't sat down and ranked these 11 issues. Important issues for NuVox, just off 12 the top of my head, would be audit provisions, 13 maintaining the negotiation process as opposed 14 to any proposed automatic triggering of final 15 unbundling rules. Those are two off the top of 16 my head. 17 Q. Do you believe that there are certain 18 issues that are still in dispute that would not 19 be in dispute today if the negotiations were 20 between NuVox and BellSouth only? 21 A. No. I believe that -- strike that. 22 No. 23 Q. So the same number of issues would 24 still be in dispute if it was just between 25 BellSouth and NuVox?</p>	<p style="text-align: right;">Page 17</p> <p>1 Q. Split evenly? 2 A. That's right. 3 Q. Did you draft your own testimony? 4 A. Yes. We drafted testimony through a 5 long process. I was in charge of and -- of my 6 testimony. I believe the first draft of the 7 testimony -- and the reason that I use the word 8 we -- is that because of the different 9 approaches that certain states have taken. Some 10 states are allowing three witnesses for an 11 issue; other states are allowing only one. 12 Q. Uh-huh. 13 A. Each company designated a witness for 14 each issue, and the initial draft, because of 15 the interplay of those three witnesses for each 16 issue, the initial draft was put together by 17 John Heitmann or Heather Hendrickson at 18 Kelley Drye based on the input that we had given 19 to John and Heather over two years of 20 negotiations and meetings among the Joint 21 Petitioners, as well as individual calls between 22 Mr. Heitmann and myself on behalf of NuVox. 23 Q. Did you send in any revisions to the 24 testimony? 25 A. Yes.</p>

<p style="text-align: right;">Page 18</p> <p>1 Q. Did the Joint Petitioners have 2 conference calls to address revisions submitted 3 by each party? 4 A. I'm -- I'm not sure how KMC's 5 witnesses or Xspedius witnesses turned in their 6 revisions. On the NuVox side, we turned in our 7 revisions to John Heitmann and Heather 8 Hendrickson. Would relay to them the changes 9 that we needed to make to the testimony. John 10 would incorporate our changes or Heather. When 11 I say John, I mean John Heitmann -- 12 Q. Okay. 13 A. -- or Heather Hendrickson and 14 Kelley Drye would incorporate the changes that 15 we made. If there was a disagreement with 16 regard to how any of the three parties wanted to 17 amend the testimony related to any particular 18 issue, we might have a conference call to 19 discuss how to handle that particular issue. 20 Q. And you went through these exercises 21 to make sure that everyone was unified on the 22 position. Would that be correct? 23 A. I don't know if that would be the way 24 to put it. Each person that sponsored 25 testimony, submitted testimony, would turn in</p>	<p style="text-align: right;">Page 20</p> <p>1 now. 2 Q. Less than 5 percent? 3 A. I don't know. 4 Q. What about for NuVox? 5 A. Well, I thought you were speaking 6 about NuVox -- the combined company. I didn't 7 realize you were speaking about -- 8 Q. Well, now, I'm saying what about NuVox 9 specifically? -- if that helps you provide a 10 more definite answer. 11 A. Well, NuVox, as you know, grew out 12 State Communications. It was originally primary 13 business focus was residential customers. NuVox 14 at one time had as many, I believe, as a hundred 15 thousand access lines. There was a high 16 percentage of residential customers. At some 17 point NuVox sold that customer base to a company 18 out of Georgia. Can't recall the name of the 19 company. Certain of those customers stayed as 20 customers of NuVox. I just don't know what that 21 universe of customers is at this time. How much 22 they have attrited away since the time that we 23 did that merger. 24 Q. Does NuVox or NewSouth market to 25 residential customers?</p>
<p style="text-align: right;">Page 19</p> <p>1 their revisions. If there was a disagreement 2 with regard to an approach on an issue, we would 3 discuss how we could come to some agreement on 4 the issue going forward. So -- I mean, that's 5 how it would work. 6 Q. How many customers does NewSouth have 7 in BellSouth's region? 8 A. NewSouth or -- 9 Q. Oh, I'm sorry. 10 A. -- the combined company? 11 Q. Yeah, combined company. 12 A. I would have to check given the number 13 that the combined company would have. Prior to 14 the time of the merger, both companies had in 15 excess of a hundred thousand access lines. I 16 want to say, and I'm not positive, when we were 17 working on this merger that each company had 18 around a 130 to 150,000 access lines. I can 19 provide you a number. I can't provide it right 20 now. 21 Q. Do you know what percentage of those 22 access lines were for residential customers? 23 A. A small percentage. 24 Q. How small? 25 A. I couldn't give you a percentage right</p>	<p style="text-align: right;">Page 21</p> <p>1 A. No. 2 Q. What percentage of the combined 3 companies' lines or serve via UNE-P? 4 A. A very small percentage. Only those 5 customers that were residential customers sold 6 on total service resale. They were transitioned 7 at some point to UNE-P. And then where we 8 would -- when I say we, I speak on behalf of 9 NuVox. I'm not positive about NewSouth because 10 I wasn't -- 11 Q. Sure. 12 A. -- as familiar with their day-to-day 13 operations over the past seven years. NuVox 14 would only sell a UNE-P line if it allowed us, 15 that is NuVox, to gain a business customer who 16 may have an outlying office in an area where we 17 could not provide services on our own 18 facilities. 19 MR. CAMPEN: Mr. Meza, just for the 20 record and clarify for the court reporter that 21 UNE-P is U-N-E-P, all caps. 22 THE REPORTER: Thank you. 23 Q. Do you have any specific knowledge as 24 to the magnitude of NuVox's UNE-P base? 25 A. Are you talking about the combined</p>

<p style="text-align: right;">Page 22</p> <p>1 company now or Legacy NuVox prior to the 2 NewSouth merger? 3 Q. I'd like combined, but if you -- 4 A. Combined? What percentage? 5 Q. Yeah. 6 A. I want to say something as low as 7 2 percent. I'm not positive. It is a very 8 minimal amount. 9 Q. Do you know how much BellSouth bills 10 the combined company a month for services? 11 A. I believe around \$3 and a half million 12 per month. 13 Q. 3.5? 14 A. Yes. 15 Q. Okay. 16 A. I could be off here or there. 17 Q. Do you know how much the combined 18 company bills BellSouth a month? 19 A. Not \$3 and a half million a month. 20 I'm not sure. I could -- 21 Q. It's substantially less than that? 22 A. Substantially less. 23 Q. Okay. Does NuVox provide services 24 that are not based on services that are 25 purchases from BellSouth? And to further refine</p>	<p style="text-align: right;">Page 24</p> <p>1 Q. Does NuVox provide wholesale services? 2 A. Define wholesale services for me. 3 Q. Services that another carrier 4 purchases from you to provide to its end users? 5 A. What type of carrier? 6 Q. Any carrier. 7 A. We have retail service offerings, like 8 the new bundle that includes local, long 9 distance, and Internet/data services. We may 10 couple that with web hosting services also. We 11 have sold to, for instance, apartment buildings 12 a, quote/unquote, wholesale product. When I say 13 wholesale, I mean that strictly in a sense of 14 that it was sold in bulk so that the aggregate 15 price of that service was less than the 16 individual price of new bundles had we sold 17 those apartment buildings, X number of new 18 bundle services per month. 19 Q. Does NuVox have its own network? 20 A. We have our own switches. We purchase 21 fiber capacity from other carriers. So when you 22 speak of -- I believe that we are a prototypical 23 facilities based carrier. 24 Q. Do you resell switching? 25 A. No.</p>
<p style="text-align: right;">Page 23</p> <p>1 my question, I'm limiting it to the BellSouth 2 region. I understand you have operations in 3 RBOCs. 4 A. I don't understand the question. 5 Q. Okay. Has NuVox purchased any type of 6 service -- wholesale service from carriers other 7 than BellSouth in order to provide service to 8 its customers? 9 A. We purchase -- NuVox purchases 10 facilities for the purpose of providing long 11 distance from multiple carriers Global 12 Crossing. MCI. I feel like we've bought some 13 services from Sprint in the past. 14 Q. For the provision of local service, 15 does NewSouth obtain wholesale services from a 16 carrier other than BellSouth? 17 A. In the BellSouth region? 18 Q. Yes. 19 A. NewSouth, I believe, had a -- has a -- 20 an interconnection agreement with Verizon that 21 serves the Simpsonville, South Carolina area, 22 serves Orlando. We purchase facility -- loop 23 facilities transport from Verizon, but in the 24 BellSouth area, we are completely relying on 25 BellSouth for high capacity loops and transport.</p>	<p style="text-align: right;">Page 25</p> <p>1 Q. What about fiber capacity? 2 A. Any fiber capacity that we purchase, 3 we use for our own facilities, our own 4 customers -- to provide service to our own 5 customers. 6 Q. What type of data services does NuVox 7 provide? 8 A. High speed Internet via an Integrated 9 T-1. 10 Q. What is your understanding of what an 11 integrated T-1 is? 12 A. An integrated T-1 service is a service 13 carried over a high capacity DS-1 loop. T-1 is 14 simply a generic term for 24 lines that may or 15 may not be allocated to voice and/or data 16 traffic. 17 Q. Does NewSouth purchase the T-1 out of 18 BellSouth's tariff or pursuant to the 19 interconnection agreement? 20 A. Pursuant to the interconnection 21 agreement. 22 Q. Has NuVox ever purchased a T-1 out of 23 the tariff? 24 A. At one time we purchased special 25 access circuits from BellSouth because there was</p>

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<p>Page 26</p> <p>1 no -- BellSouth had not developed a very 2 reliable or quick provisioning process for new 3 EELs. 4 Q. Uh-huh. 5 A. We would purchase a special access 6 circuit. So, yes, we purchased special access, 7 have that provisioned by BellSouth to the 8 customer, and would have to stay up with 9 BellSouth on special access for 30 days, and 10 then we would transition that circuit to an EEL 11 to take advantage of the more favorable UNE 12 prices. 13 Q. Does NuVox sell an ADSL product? 14 A. NuVox has in the past sold DSL 15 services to customers. I'm certain that some of 16 those customers are still on DSL product. I 17 don't know if it is ADSL, HDSL, or xDSL just 18 because I'm not as familiar with the 19 distinctions between those products. 20 Q. Do you know if any of your customers 21 currently receive BellSouth FastAccess DSL 22 service? 23 A. I'm not aware of any specific 24 instances where we would provide the voice 25 service and BellSouth provides the FastAccess</p>	<p>Page 28</p> <p>1 Q. How is broadband provided in a NuVox 2 bundle? 3 A. In most instances, we will provide 4 a -- again, a T-1, and I use that generic term 5 not as a type of facility but just the industry 6 jargon for 24 -- a 24-line capacity circuit. 7 Integrate that T-1 so that certain channels of 8 the 24 channels are dedicated to voice and 9 certain channels are dedicated to data or 10 broadband service. 11 Q. So instead of splitting the high 12 frequency and low frequency portion of a loop, 13 you would take some portion of the 24 loops in a 14 T-1 and strictly put data on it? 15 A. You're getting too -- I wish I were an 16 engineer. I'm not. I'm telling you everything 17 that I know about the integrated T-1 product. 18 Q. Fair enough. Do your customers 19 purchase services out of your tariffs? 20 A. Our tariffs are what we see as a 21 sky-is-the-limit proposal as in a ceiling. We 22 file them with the commissions as required. A 23 high percentage of our customers are on 24 contracts. 25 Q. Do your contracts incorporate by</p>
<p>Page 27</p> <p>1 service. I can't say for sure whether there's 2 not some access line in our network where we 3 provided, at one point in time, both services 4 and that customer has switched over to BellSouth 5 for FastAccess. 6 Q. When you win over a customer, are you 7 interested in selling that customer only voice 8 service and letting another carrier's ISP serve 9 the data, or is that something your company 10 tends to avoid? 11 A. We're interested in selling any 12 service that will allow us to make the 13 appropriate margins. If that means -- if -- we 14 run a business case that shows we can make money 15 on the voice side without providing the data and 16 having some third party, be it BellSouth via its 17 FastAccess service or Earthlink via its -- 18 whatever the name of that service is -- that 19 would be something that we would consider doing. 20 At this point in time, our focus is to sell both 21 the voice and the data to customers that we're 22 able to persuade to purchase our services. 23 Q. Has or is NewSouth purchasing 24 BellSouth's wholesale DSL product today? 25 A. I'm not sure.</p>	<p>Page 29</p> <p>1 reference to tariffs? 2 A. Yes. 3 Q. Does KMC -- excuse me, I apologize I 4 don't mean any disrespect. No disrespect to 5 KMC 6 Does NewSouth consider KMC to be a 7 competitor? 8 A. Yes. 9 Q. What about Xspedius? 10 A. I'm not certain what markets we have. 11 that overlap. But in the sense that they're 12 selling small business customers or large 13 business customers and we're trying to sell to 14 those same customers in a -- yes, a competitor, 15 if you will. 16 Q. Does NuVox attempt to obtain Xspedius' 17 or KMC's customers? 18 A. I can't speak for the sales 19 department, but if a salesperson were to go out 20 and offer a proposal to a customer and you don't 21 know who that potential customer is receiving 22 services from, I'm certain that from time to 23 time we offer proposals to KMC customers, 24 Xspedius customers, ITC DeltaCom customers. But 25 given BellSouth's dominance in the market, more</p>

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<p style="text-align: right;">Page 30</p> <p>1 than likely it's a BellSouth customers. 2 Q. Do you feel that competition among 3 CLECs is growing versus competition between 4 CLECs and BellSouth for business customers? 5 A. It's growing year to year, but I think 6 that the volume of competition -- or the 7 competition among -- or between CLECs as opposed 8 to between all parties, including BellSouth, 9 just between the CLECs is still minimal on a 10 day-to-day basis. It's a big sea. Most of the 11 sea is filled with BellSouth customers. You're 12 more -- more likely than not, you're going to 13 run into a BellSouth customer before you run 14 into a KMC customer with a proposal. 15 Q. Is NuVox arbitrating or negotiating an 16 interconnection agreement with another RBOC? 17 A. I can't speak with a lot of specifics 18 regarding what's going on in Missouri, Kansas, 19 and Oklahoma right now. There are proceedings 20 out there. I'm not sure if they're with regard 21 to a generic agreement proposal or if they're 22 NuVox specific. 23 Q. What was the most recent arbitration 24 agreement that NuVox has entered into with 25 another RBOC?</p>	<p style="text-align: right;">Page 32</p> <p>1 the ultimate user of telecommunications 2 services. And the Petitioners want to define 3 end user as a customer of the party. 4 Q. What is your concern with BellSouth's 5 language? 6 A. That's a major issue because 7 oftentimes we will sell a customer that is an 8 office suite or apartment complex. The party 9 that is -- signs the contract is not necessarily 10 the ultimate user of the telecommunications 11 services. The definition that BellSouth 12 proposes, in my mind, would limit us to MDU 13 arrangements, apartment complex arrangements, 14 office suite arrangements, a good segment of the 15 customer base that we would like to provide 16 services to. 17 Q. If that concern was alleviated or 18 addressed, would this issue -- could this issue 19 be resolved? 20 A. The BellSouth definition is too 21 restrictive. I don't know of any ways right now 22 to resolve this issue without going to the Joint 23 Petitioner definition, but I also recognize 24 there are a lot of different ways to skin a cat. 25 Maybe there are some other magic words we could</p>
<p style="text-align: right;">Page 31</p> <p>1 A. I don't believe that we have 2 completely arbitrated any of our agreements. I 3 think we've opted into agreements in the past 4 I can't speak for the midwest. I can only 5 really speak for BellSouth. 6 (INTERRUPTION.) 7 THE WITNESS: Hold on one second. Let 8 me cut this off. Sorry about that. 9 Q. Any time you need a break, just let me 10 know. 11 A. Okay. With regard to NuVox, we 12 negotiated an agreement in year 2000. It's 13 effective as of June 30, 2000. On the eve of 14 arbitration, we settled the issues out. 15 Q. Do you have any understanding as to 16 whether the combined entity has entered into a 17 arbitration, I mean, excuse me, interconnection 18 agreement outside of BellSouth's region within 19 the past year? 20 A. I'm not sure just because I'm not as 21 familiar with the midwest operations. 22 Q. Issue 4 deals with definition of an 23 end user. What is your understanding of the 24 dispute between the party? 25 A. BellSouth wants to define end user as</p>	<p style="text-align: right;">Page 33</p> <p>1 use. Right now the best alternative, as I see 2 it, is a party of a -- a customer of a party is 3 the definition of an end user. 4 Q. Do you have a general disagreement 5 with the concept that an end user should be the 6 ultimate user of the telecommunication service? 7 A. I really don't understand. 8 Q. Okay. Let's back away from this 9 dispute in the context that it has arisen. Do 10 you believe that an end user generally should be 11 defined as the ultimate user of the 12 telecommunication service? 13 MR. CAMPEN: Objection to the form. 14 A. I believe with regard to this 15 interconnection agreement and our use of -- 16 through the purchase from BellSouth of certain 17 facilities and services that we should be able 18 to purchase those facilities and services from 19 BellSouth, incorporate them into our network, 20 and provide services to our customers in a 21 lawful manner. 22 Q. Okay. 23 A. I don't know if those customers, for 24 instance, the office suite or the apartment 25 complex that is a party to the contract with us</p>

<p style="text-align: right;">Page 34</p> <p>1 is the ultimate end user of those services. It 2 may, in fact, be a tenant of the apartment 3 complex. I don't want to be precluded from 4 selling services to an apartment complex based 5 on a restrictive definition and interconnection 6 agreement. 7 Q. Is it the Joint Petitioners' 8 contention to comply with the law regarding what 9 services it purchases from BellSouth and then 10 resells or provides to another entity? 11 A. Repeat that, please. 12 Q. Sure. Let me ask it a different way. 13 Is it your understanding that there are certain 14 services that a CLEC can purchase from BellSouth 15 and then resell as their own? 16 A. I would imagine that NuVox could 17 purchase high capacity loops from BellSouth. 18 And if we were able to convince some third party 19 to purchase those loops from us and take the 20 responsibility of selling those loops to their 21 customers, being responsible for all of the 22 billing and collection, remitting those amounts 23 to us to pay BellSouth, I don't necessarily see 24 that there's anything in that scenario that 25 would violate the law.</p>	<p style="text-align: right;">Page 36</p> <p>1 A. There may be some. I'm not -- I don't 2 know any specifics. My position is and our 3 company's position is that the BellSouth 4 proposed definition of end user as the ultimate 5 user of telecommunications services is too 6 restrictive and most likely more restrictive 7 than any law that would prohibit to whom we 8 could sell our services. 9 Q. Do you call your customers customers 10 or end users? 11 A. Customers. 12 Q. Is end users defined in your tariff? 13 A. I'm not certain. I would expect that 14 it is but I'm not certain. 15 Q. Are you aware of what a qualifying 16 service is? 17 A. In what regard? 18 Q. In assessing or accessing a UNE for 19 the purpose of providing telephone service? 20 A. I'm aware that there are restrictions 21 as to how we can use certain circuits that may 22 be UNEs. 23 Q. Is whether or not something is a 24 qualifying or nonqualifying service a reason why 25 you are objecting to BellSouth's language?</p>
<p style="text-align: right;">Page 35</p> <p>1 Q That scenario, the way you described 2 it, I presume is not likely to happen? 3 A. It's not likely to happen. 4 Q. Is it fair to say that your main 5 objection to the language is that you believe 6 it's too restrictive in that it limits your 7 ability to sell services to an apartment complex 8 owner or a subdivision developer? 9 MR. CAMPEN: Objection to form. 10 A. I believe that it is too restrictive 11 in that it attempts to limit the persons to whom 12 NuVox can sell its services in compliance with 13 the law that -- the applicable law as included 14 in the general terms and conditions. 15 Q. What is your understanding of the law 16 as to limitations regarding who can be a NuVox 17 customer? 18 A. I really don't understand. 19 Q. Okay. I understood your response to 20 me to mean that you don't want to have any 21 restrictions on your ability to sell services to 22 your customers that's compliant with the law? 23 A. Right. Right. 24 Q. Are there restrictions with the law as 25 to who can be your customer?</p>	<p style="text-align: right;">Page 37</p> <p>1 A. I don't believe so. 2 Q. Other than the apartment complex 3 situation, is there any other scenario that you 4 can imagine where BellSouth's definition may be 5 too restrictive? 6 A. Over the course of these negotiations, 7 we've talked about Internet service providers. 8 I'm not sure if any dispensation has been made 9 for Internet service providers. I think that it 10 has. But the way that the technology -- there 11 could be technological changes that allow for 12 different ways to use circuits that we may 13 purchase from BellSouth pursuant to this 14 agreement that might be restricted if we were to 15 use this ultimate end user language. That would 16 be completely within the bounds of this 17 agreement and appropriate. 18 Q. Can you give me an example? 19 A. I can't. I'm saying I don't want to 20 tie my hands in one of the first definitions in 21 the general terms and conditions to providing 22 services in an appropriate fashion and in 23 compliance with this agreement. 24 Q. So would it be fair to sum up your 25 reason as far as the ISP issue, the apartment</p>

<p style="text-align: right;">Page 38</p> <p>1 complex issue, and the potential for new 2 technology that may change the understanding of 3 what an end user is? 4 MR. CAMPEN: Objection to the form of 5 the question. 6 Q. Would that be fair? 7 A. The reason that we have an issue going 8 forward is that we -- you know, when I say we, I 9 say NuVox, not necessarily Joint Petitioners but 10 they fall into this category -- believe that the 11 definition that BellSouth has proposed is too 12 restrictive. The examples that I gave you were 13 just that. They were examples of why this is 14 too restrictive. If I could quantify the number 15 or types of businesses that we might be 16 prevented from serving, if we used the BellSouth 17 definition, I would. I can't give you any more 18 examples today. I'm sure that there are others. 19 Q. Do you consider transport-to-transport 20 UNE combinations as EELs? 21 A. No. 22 Q. Is NuVox providing any 23 transport-to-transport UNE combinations today? 24 A. I don't believe so. 25 Q. What would constitute a</p>	<p style="text-align: right;">Page 40</p> <p>1 adequate manner and according to the law, there 2 should be some penalty, if you will, or agreed 3 to form of compensation for the failure to 4 perform that service adequately with reasonable 5 care in accordance with the law. 6 Q. Does that apply to the purchaser of 7 tariff services? 8 A. Explain to me, does what apply to a 9 purchaser of tariff? 10 Q. If your -- the recitation of your 11 position in the law that you just gave? 12 A. If a tariff is approved by the 13 commission or regulatory agency charged with 14 approving tariffs, they set that rule. It 15 doesn't matter what I think. 16 Q. It's your understanding that a 17 commission can dictate to you your terms and 18 conditions set forth in a tariff? 19 A. A commission can refuse to implement 20 a tariff filing if there are objections to that 21 tariff, if they find problems. 22 Q. Has that ever happened to NuVox? 23 A. I can't recall. 24 Q. Has that ever happened to NuVox or to 25 any CLEC regarding the limitation of liability</p>
<p style="text-align: right;">Page 39</p> <p>1 transport-to-transport UNE combination? 2 A. I'm not an engineer, again, but my 3 understanding is having transport on both ends 4 of a loop to provide services to another 5 carrier. I could be way off. 6 Q. Okay. Do you believe that provisions 7 that are one sided are inappropriate? 8 A. Not if they're negotiated for and are 9 traded off for other concessions, not 10 necessarily. 11 Q. Absent that situation, do you believe 12 they're appropriate? 13 A. They can be, yes, but I don't know how 14 to answer this question in a vacuum. 15 Q. Well, do you believe that provisions 16 that put all the risk and liability on one party 17 is inappropriate? 18 A. In terms of an agreement between a 19 purchaser of services and a service provider, 20 yes. 21 Q. Why is that? 22 A. Because a purchaser of services is 23 providing consideration in the form of money for 24 the performance of a service. If that service 25 is not performed with reasonable care in an</p>	<p style="text-align: right;">Page 41</p> <p>1 language interposed into a tariff? 2 MR. CAMPEN: Objection to the form of 3 the question. 4 A. I can't recall 5 Q. Do you know if that's happened to 6 NuVox? 7 A. I don't know if that's happened to 8 NuVox. 9 (DEPOSITION EXHIBIT NO 5 MARKED.) 10 Q. I'm going to show you what's been 11 marked Exhibit 5. 12 A. Okay. 13 MR. MEZA: And I apologize, Henry, I 14 don't have another copy of that for you. It's 15 Exhibit A to your -- first page of Exhibit A to 16 your Direct -- Direct to North Carolina. 17 A. Uh-huh. 18 Q. Focus your attention on the language 19 relating to limitation of liability. 20 A. Uh-huh. 21 Q. Who drafted this language? 22 A. When we began this process and 23 received BellSouth's template interconnection 24 agreement, that basically shifted all of the 25 risk and all of the downside to the CLEC from</p>

<p style="text-align: right;">Page 42</p> <p>1 BellSouth despite the fact that the CLECs would 2 be purchasing services under the agreement. We 3 discussed some alternatives about how to make 4 this more equitable to the parties in terms of 5 liability limitations, indemnification, and 6 other issues. We discussed many different 7 proposals. This is a modification from original 8 proposals that we provided to BellSouth. The 9 original language that this is an outgrowth of 10 was drafted, I believe, by me and by 11 John Heitmann. 12 Q. The 7 and a half percent concept? 13 A. Not the 7 and a half percent concept. 14 I wanted, I'm sure, a higher percentage than 15 that originally. 16 Q. What type of agreements did you base 17 this on? 18 A. I based it on software agreements 19 where NuVox purchases software, both development 20 services and turnkey software, indemnification 21 provisions out of those agreements 22 Indemnification -- I'm sorry, liability 23 provisions out of those agreements. Liability 24 provisions out of other vendor agreements where 25 we purchase these services for a fee over the</p>	<p style="text-align: right;">Page 44</p> <p>1 from the provisions in these interconnection 2 agreements and in turn -- we are -- in those 3 instances, we're providing a service to a 4 customer and we would like to maintain the 5 flexibility to offer our customer some 6 variations in our contract terms. Our contract 7 terms can differ from ones in our tariff. And 8 we do differ contract terms with our customers 9 from time to time. 10 Q. I appreciate your response, but it 11 didn't answer my question. 12 Do you have a like provision, an 13 identical provision, as to what you see in 14 Exhibit 5? 15 A. I don't believe we have an identical 16 provision like this in our tariff, no. 17 Q. Do you have any type of provision in 18 your tariffs that equate the limitation of 19 liability to the amount billed up to the date 20 the claim arose? 21 A. We have a provision in our tariff that 22 provides for credits, and I believe that if a 23 customer -- and this may come out of our form 24 contract -- if a customer terminates service 25 with us for service failures during the first</p>
<p style="text-align: right;">Page 43</p> <p>1 course of some term from other vendors. There 2 are also liability provisions in certain lease 3 agreements where we are not only the sublandlord 4 but that we are also the tenant. And those are 5 just to name a few of the commercial agreements 6 that include more equitable liability 7 provisions. 8 Q. Did you draft that provision that you 9 see there? 10 A. The provision that I see here is -- 11 was modified from an original provision that 12 John Heitmann and I worked on over two years 13 ago. It was modified in an attempt to get this 14 issue resolved. Whether I actually made the 15 changes to the red line agreement, I don't know. 16 But we have discussed this provision for over 17 two years now, so I'm certain that some of the 18 things that I discussed with John and with 19 Xspedius and with KMC are in this provision. 20 Q. Have you seen a like provision in any 21 interconnection agreement? 22 A. I can't say that I have 23 Q. Do you have a like provision in your 24 tariff? 25 A. Our tariff provisions are different</p>	<p style="text-align: right;">Page 45</p> <p>1 180 days, we will also pay to have that customer 2 switched over to a service provider, a 3 reasonable cost associated with that. So in 4 terms of providing some additional financial, I 5 guess, result for the customer, yes. 6 Q. It's your testimony that your tariff 7 regarding the return of monies received if the 8 contract is terminated in 180 days is identical 9 to this? 10 A. No, that's not my testimony. 11 Q. Do you have a like provision in a 12 NuVox customer contract? 13 A. We amend contract provisions from time 14 to time. That often has to do with the size of 15 the customer, the number of lines that we're 16 going to get, the gross margins that we'll 17 receive. We will modify contract terms where 18 warranted to win a customer. 19 Q. Do you have a contract that 20 incorporates a limitation of liability clause 21 that is similar to what exists in Exhibit 5? 22 A. We have contract clauses that provide 23 customers with different liability provisions 24 than are in our tariff. How those liability 25 provisions in custom customer contracts relate</p>

<p style="text-align: right;">Page 46</p> <p>1 to this provision, they would be similar in that 2 they're different from our tariff -- from our 3 tariff to a liability provision. 4 Q. How many customers have you deviated 5 from your tariff limitation liability language 6 for contracts? 7 A. We add addendum to customer contracts 8 on a daily basis. How many are changes to 9 liability sections specifically, I'm not 10 certain. 11 Q. Did you provide responses to 12 BellSouth's discovery? 13 A. Yes. 14 (DEFENDANT'S EXHIBIT NO. 6 MARKED.) 15 Q. Show you what's marked as Exhibit 6. 16 I don't have another copy. Did you provide a 17 response to Request for Production No. 16? 18 A. That's what this appears to be. This 19 says there's some attached documents? 20 Q. I'm asking you if you provided a 21 response? 22 A. Yes. 23 (DEPOSITION EXHIBIT NO. 7 MARKED.) 24 Q. Okay. I'm going to show you, 25 Mr. Russell, what's been identified and produced</p>	<p style="text-align: right;">Page 48</p> <p>1 A. What am I supposed to do with this 2 now? 3 Q. Well, it's produced -- if it's 4 confidential or something you don't want me to 5 have, I can turn it. 6 A. I mean, it's a Qwest agreement, and 7 has -- appears to discuss their service level 8 agreement. 9 Q. If you turn to 00040? 10 A. Uh-huh. 11 Q. You include, looks like a portion of a 12 contract? 13 A. This is part of a Frontier agreement. 14 I recognize type face. It talks about billing 15 and payment to State -- by State Communications 16 to Frontier. I don't know why this would be -- 17 have been produced in response to Section 16 -- 18 I mean, to interrogatory -- or request for 19 production of 16. 20 Q. Does -- did NuVox do a diligent search 21 of its contracts to respond to 16? 22 A. I believe that we provide a tariff in 23 response to -- or tariff section in response to 24 this section. We have form customer service 25 contracts. It says produce -- says for the</p>
<p style="text-align: right;">Page 47</p> <p>1 to BellSouth as exhibit -- as request for 2 production 16. 3 A. Okay. 4 Q. For some reason my copy didn't include 5 all of this. And for ease of convenience, I'm 6 going to attach documents from 16 that have a 7 NuVox Bates stamp. Would you agree with me that 8 the abbreviation MBX represents NuVox? 9 A. Yes. 10 Q. These are three pages Bates stamped 11 00039, 00040, 000004 -- excuse me, that's 12 Xspedius Those two documents. Have you seen 13 these contracts before? 14 A. Appears to be a Qwest agreement. 15 Q. That was produced by NuVox in response 16 to request for production 16? 17 A. This is a Qwest agreement. 18 Q. Do you know why it was produced? 19 A. I have no idea. It must be a mix-up. 20 Q. The next page -- 21 MR. CAMPEN: Excuse me, Mr. Meza. For 22 the record, that's -- the document to which 23 Mr. Russell is referring is Bates stamped 24 000039? 25 MR. MEZA: Yes.</p>	<p style="text-align: right;">Page 49</p> <p>1 NuVox response, please see attached documents. 2 Was this all the documents that were attached? 3 Q. For 16, yes. 4 A. I can't explain that. 5 Q. Okay. You would agree with me that 6 those documents that were produced are 7 nonresponsive? 8 A. They're not NuVox -- they're NuVox 9 documents, but they're not related to request 10 for production of 16. 11 Q. Does NuVox have documents that is 12 responsive to 16? 13 A. We have our tariffs that are on file 14 with the respective state public service 15 commissions. We have form customer service 16 agreements. And we have, again, from time to 17 time modified customer service agreements that 18 are modified for specific customers. 19 Q. Does NuVox still have those documents 20 in its possession? 21 A. Most likely, yes. I mean, I would 22 expect so. Tariffs, of course, are on file with 23 the commissions. 24 MR. CAMPEN: Mr. Meza, just for the 25 record, the tariffs were provided in that</p>

<p style="text-align: right;">Page 50</p> <p>1 production last week and they're on CDs. 2 MR. MEZA: Sure. 3 (DEPOSITION EXHIBIT NO. 8 MARKED.) 4 Q. I'll show you another response. Mark 5 it as Exhibit 8 Petitioner's Response to 6 Request for Production No. 14. Have you seen 7 that document before? 8 A. It appears to be response to request 9 for production of documents. 10 Q. I'm going to show you -- what does 14 11 request? 12 A. Request to produce tariffs and/or end 13 user contacts that do not contain any limitation 14 of liability language. 15 (DEPOSITION EXHIBIT NO. 9 MARKED.) 16 Q. Mark these the next composite exhibit, 17 Exhibit 9, and represent to you that the 18 documents the Joint Petitioners produced in 19 response to Request for Production No. 14 -- 20 A. Uh-huh. 21 Q. -- Bates numbered MBX 00027 through 22 30. See if you've seen those documents before? 23 A. Uh-huh. This is a Legacy NuVox master 24 service agreement. 25 Q. What is a Legacy service agreement?</p>	<p style="text-align: right;">Page 52</p> <p>1 saying? 2 Q. Total absence? 3 A. Total absence, that's correct. 4 Q. Do you know what the current agreement 5 provides for regarding limitation liability? 6 A. Form agreement? 7 Q. Your current? 8 A. Current form agreement. 9 Q. Your BellSouth current agreement? 10 A. Current agreement, it provides for a 11 limitation; however, in the general terms and 12 conditions, there are some financial 13 responsibility for BellSouth for acts that cause 14 financial losses of NuVox. I can't recall the 15 exact section. 16 Q. Do you know what the scope of the 17 limitation liability is? 18 A. I'm not certain off the top of my 19 head. 20 Q. Do you think it's more consistent with 21 BellSouth's current proposal or NuVox's? 22 A. It's probably more consistent with 23 BellSouth's current proposal. 24 Q. Do you have that language I provided 25 to you on Friday?</p>
<p style="text-align: right;">Page 51</p> <p>1 A. NuVox and NewSouth each had their own 2 service agreements and LOAs and e-mail 3 assignment forms, et cetera. This is a form 4 that was used at one point in time by NuVox and 5 it sells services to customers. It's the form 6 agreement that sales people would print off in 7 the field and use to begin the negotiation 8 process with potential customers that we might 9 sell our service to. 10 Q. The request asks for documents that 11 lack limitations liability language; is that 12 correct? 13 A. Uh-huh. 14 Q. And if you turn to the third page, 15 I've highlighted it for you. 16 A. Uh-huh. 17 Q. Would you agree with me that that 18 provision incorporates all the tariffs -- 19 A. It does incorporate the tariffs 20 There must be some mix-up. This appears to be 21 more responsive to 16 as opposed to 14. I don't 22 believe there are any agreements or tariffs that 23 do not provide any limitation of liability. 24 Q. Do you know what the -- 25 A. Any full -- you understand what I'm</p>	<p style="text-align: right;">Page 53</p> <p>1 A. Yes, I do. 2 Q. It's Exhibit 5. 3 A. Right here. Exhibit 5. 4 Q. Yeah. 5 A. I'm trying to keep these things 6 separated 7 Q. Good. 8 A. Okay. 9 Q. How would this work? I would like for 10 you to explain to me under your reading of this 11 provision how it would work. 12 A. Here's how it would work as I 13 understand it. In the event that a party made a 14 claim that was due to direct or proximate result 15 of a negligent act of BellSouth in its 16 provisional services under this agreement and 17 BellSouth was found liable for the damages that 18 the party claimed, that BellSouth's cumulative 19 exposure would be 7.5 percent of the aggregate 20 charges paid by, in my case, NuVox as of the 21 date that the claim arose. 22 So if on day two of this agreement 23 BellSouth has a total service outage in 24 someplace that it's found to be the direct 25 result of some error or omission on the part of</p>

<p style="text-align: right;">Page 54</p> <p>1 BellSouth and somebody makes a claim for losses, 2 could be personal injury or something else that 3 are caused by BellSouth's act of omission, but 4 the day that claim arose, 7.5 percent of the 5 amount that NuVox had paid to BellSouth would be 6 available to the plaintiff, if you will. 7 Likewise, if two years into this agreement the 8 claim arises, 7.5 percent of the aggregate 9 amount, if the plaintiff were given some sort of 10 award, 7.5 percent of the aggregate amount paid 11 by NuVox under this agreement would be available 12 to compensate that plan. 13 Q. The language uses the phrase paid or 14 payable. Seven and a half percent of the 15 aggregate fees charged or other amounts paid or 16 payable. Do you see that? 17 A. What line are you looking at? 18 Q. Look at this. 19 A. Oh, I see. I see. 20 Q. It's in bold. 21 A. I got it. 22 Q. What does that mean, paid or payable? 23 A. I would say the amount paid or that is 24 the subject to a current invoice that's due to 25 BellSouth.</p>	<p style="text-align: right;">Page 56</p> <p>1 paid by NuVox to BellSouth, which is zero, so 2 limitation would be zero. There would be no 3 liability potential or exposure for BellSouth on 4 day one of this agreement. 5 Q. And if it happens on the last day, it 6 would be 7 and a half percent of approximately 7 3 and a half million? 8 A. Say this is -- how many months is this 9 agreement going to be for, 30 months? 10 Q. Three and a half years. 11 A. Three and a half years. I thought it 12 was two and a half? 13 Q. I don't know. Let's presume it's 14 three. 15 A. Three. Okay. Let's use round figures 16 and say 40 million bucks. Seven and a half 17 percent of that would be \$3 75 million for -- 18 after earning 40 million. 19 Q. I would argue with after earning, but 20 hopefully collecting. What happens if the Joint 21 Petitioner asserts that throughout the term of 22 the contract BellSouth has failed to provide 23 something under the contract and this failure 24 started on the first day and continued to the 25 last day?</p>
<p style="text-align: right;">Page 55</p> <p>1 Q. So it's not billed -- paid or billed? 2 A. Paid or billed. 3 Q. And then further on, it's 7 and a half 4 percent as of the day the claim arose. Do you 5 see that? 6 A. Yes. I was under the impression that 7 we had modified our position to the day -- to 8 the day. Yes, that's right. The day the claim 9 arose, we started somewhere else. That's right 10 Q. What is your interpretation of when 11 the day the claim arose? 12 A. If I get run over by a BellSouth truck 13 tomorrow, tomorrow would be the day the claim 14 arose. If I get -- I'm trying to think of 15 some -- the day the potential plaintiff knew or 16 had good reason to know that they may have a 17 claim against BellSouth, that's the day the 18 claim arises. 19 Q. If the claim arose on day one, then 20 what would be the limitation of liability? 21 A. There wouldn't be any on BellSouth. 22 NuVox would not have paid any fees to BellSouth 23 on day one of this agreement. 24 Q. So there would be no limitation? 25 A. It would be limited by the amounts</p>	<p style="text-align: right;">Page 57</p> <p>1 A. The claim would have arose prior to 2 the last day, so the damages would be limited. 3 Q. To what? Is it zero? 4 A. Could be zero. 5 Q. So under that interpretation, my 6 understanding of your interpretation of the 7 agreement, if you find on the last day of the 8 contract that we've been doing something 9 improperly since day one, your interpretation of 10 this provision is that BellSouth would have no 11 liability? 12 A. I'm not thinking of this in terms of 13 NuVox and BellSouth. I'm thinking of this in 14 terms of NuVox end users, customers. 15 Q. I'm not sure I understand your 16 response. I mean, the question is that this 17 act, this harm -- 18 A. The act or harm -- 19 Q. -- the claim occurred on day one and 20 continued until the last day. You didn't do 21 anything about it until the last day. What 22 would BellSouth's limitation of liability be? 23 A. I'm trying to think of a claim that 24 would go on for that long, it would be covered 25 by this agreement. I think in terms of -- for</p>

15 (Pages 54 to 57)

<p style="text-align: right;">Page 58</p> <p>1 example, BellSouth knows that the manager of the 2 Greenville switch site central office is 3 mismanaging that facility. The facility has 4 problems that take down all of our Greenville 5 customers. That happens and BellSouth can't get 6 this fixed for two days, let's say. And all of 7 our Greenville customers make a claim against 8 NuVox related to a negligence on the part of 9 BellSouth. Any liability of BellSouth under 10 that set of circumstances would be related to -- 11 would be subject to the amount that NuVox had 12 paid in aggregate up to the day that claim 13 arose. I don't really know how a situation like 14 that applies to what -- the type of question you 15 just asked. 16 Q. Well, I'll see if I can try to make it 17 more clear. But presume for me, that regardless 18 of whether it's likely or not, there is a 19 situation whereby you believe BellSouth has done 20 something to harm NuVox starting on day one, 21 continued to the last day of the contract. You 22 raise it on the last day. What day would the 23 claim arise? 24 A. The day the claim arose would be the 25 day that NuVox realized it potentially had a</p>	<p style="text-align: right;">Page 60</p> <p>1 no valid reason to deny access? So it would 2 arise on the day that you had reason to know 3 that you had a claim. 4 Q. So you're adding language to this 5 provision, aren't you? 6 A. No. 7 Q. Does it say the day the claim arose or 8 the date that -- 9 A. The day the claim arose. 10 Q. And you're interpreting that to mean 11 something other than the actual day the claim 12 arose? You are now impugning knowledge to when 13 NuVox determines when the claim arose? 14 A. I'm not impugning knowledge to it. In 15 my example, if BellSouth -- if I get a call 16 today from Jim Ackerhome that says, Bo, you have 17 to do something, BellSouth has stopped providing 18 us access to provisioning services. I would 19 say, Jim, that's great. I'm sitting here with 20 Robert Culpepper and Jim Meza. They're going to 21 have those turned back on. If you looked at me 22 and told me, we're not going to do that and we 23 went through the dispute regulation procedure, 24 my claim would arise when it became apparent 25 that BellSouth is not going to honor the</p>
<p style="text-align: right;">Page 59</p> <p>1 claim against BellSouth. 2 Q. So under that scenario, your 3 interpretation of the day of the claim arose 4 would be the last day? 5 A. Would be -- if on the second day -- 6 if -- let's say on the tenth day BellSouth stops 7 allowing NuVox access to provisioning services 8 for no reason. The claim would arise on the 9 tenth day, the day NuVox realized there's a 10 problem. 11 Q. So what you're really saying -- 12 A. Actually -- let me take that back. 13 Because denied provisioning services on day ten 14 oftentimes -- or in the past, we've had 15 experience where BellSouth may stop providing 16 access to provisioning services but it's because 17 of an error. That gets fixed quickly. I'm 18 talking in a day. BellSouth stopped providing 19 access to provisioning services. NuVox brought 20 this to the attention of BellSouth. BellSouth 21 continued refusing to provide provisioning 22 services. The claim would arise sometime 23 between the tenth day -- some reasonable amount 24 of time. Is that 30 days for BellSouth to turn 25 back on those provisioning services if they have</p>	<p style="text-align: right;">Page 61</p> <p>1 agreement. 2 Q. I understand your position, but you 3 keep on changing my hypothetical. And as a 4 lawyer, I know that is your nature. So I ask 5 you to stick to my hypothetical. Okay. And I 6 do appreciate your response. 7 A. Give me an example of something that 8 could be happening on day one that continues to 9 the final day. 10 Q. Overbilling. 11 A. A single overbill? 12 Q. An overbilling instance or some type 13 of billing problem that you don't realize 14 until -- 15 A. Well, each overbilling instance -- 16 each -- an overbilling, we would have to dispute 17 within a certain period of time according to our 18 current agreement with specificity within, I 19 believe, 30 days. So if there's an overbilling 20 situation with an invoice, the day that claim 21 arose was when the invoice was issued by 22 BellSouth and we have 30 days to dispute that 23 bill, so the claim is related to that bill, that 24 single bill. So I don't see that as -- 25 Q. A circuit that's not currently active,</p>

<p style="text-align: right;">Page 62</p> <p>1 that you don't know that you've been -- there's 2 been no activity for you to monitor and you've 3 been billed it and you've been paying it. 4 A. Okay. That would the bill -- the 5 limitation -- if that went on for three years -- 6 Q. Uh-huh. 7 A. -- the damages related to that circuit 8 would be the cost of that circuit over a 9 three-year period, so it's limited by what rate 10 you're selling us. 11 Q. Is it fair to characterize your 12 testimony is that the day the claim arose could 13 be extended by the time necessary for NuVox to 14 realize that it has a claim? 15 A. In some instance, yes. 16 Q. You agree with me that conceptually 17 day one of when the actual act occurred may not 18 be the date that NuVox realizes? 19 A. In most instances, day one would be 20 the day the act occurred. 21 Q. Maybe, but there may be instances 22 where it's delayed? 23 A. There may be instances where it's 24 delayed, that's correct. 25 Q. Would you agree with me that a company</p>	<p style="text-align: right;">Page 64</p> <p>1 if a NuVox end user sues me for negligence of 2 BellSouth -- 3 A. Uh-huh. 4 Q. -- wouldn't your limitation of 5 liability and your tariffs preclude your 6 exposure to the cost of the services that were 7 not provided? 8 A. It should unless we had made some 9 change to that customer's contract. But 10 speaking in a real world example, we have a 11 situation in Nashville, Tennessee, where a 12 Federal Express truck hit a BellSouth telephone 13 pole. A NuVox end user -- I'm sorry. BellSouth 14 truck was going to the office building to 15 service a NuVox end user. That's what the truck 16 role record showed. Plaintiff lost telephone 17 access in an office building, sued NuVox, 18 BellSouth, and Federal Express. How can I -- 19 how -- why should my contract limit BellSouth's 20 liability in that instance if at all? 21 Q. How much were you out in that 22 instance? 23 A. It's still being litigated. 24 Q. What's your exposure? 25 A. Don't know.</p>
<p style="text-align: right;">Page 63</p> <p>1 considers claims or lawsuits as an asset of the 2 company? 3 A. Claims or lawsuits against the company 4 or that the company has? 5 Q. That the company has a claim or 6 lawsuit against BellSouth, would the company 7 consider that to be an asset of the company? 8 A. I'm not familiar with the accounting 9 terms. I don't necessarily know if they would 10 consider it an asset or not. 11 Q. The language that we're referring to 12 in Exhibit 5 is not the Joint Petitioners' 13 original language, is it? 14 A. No. No, it's not. 15 Q. And, in fact, the original language -- 16 well, do you know what the original language 17 provided? 18 A. I would have to go back and look at 19 it, but I was familiar with it at one time. 20 Q. Do you know why you submitted a 21 revised language? 22 A. Probably in an effort to resolve this 23 issue with BellSouth. 24 Q. In the hypothetical that you gave me 25 back in response to my hypothetical, you said,</p>	<p style="text-align: right;">Page 65</p> <p>1 Q. What does your tariff say? 2 A. Tariff doesn't have anything to do 3 with the person that's filed the lawsuit against 4 NuVox. The truck role was going to the 5 premises, BellSouth truck on behalf of a NuVox 6 customer in that office building. This person 7 is completely unrelated to NuVox, completely 8 unrelated to BellSouth, completely unrelated to 9 Federal Express. Lost telephone service. The 10 allegations are the Federal Express driver was 11 negligent, BellSouth's negligent in where it put 12 the telephone pole, and NuVox was negligent in 13 assigning BellSouth as an agent for conducting 14 service to that location. 15 Q. You're a lawyer. 16 A. Yes. 17 Q. Do you find that claim to have merit? 18 A. You can get sued at any time for any 19 reason. I don't necessarily find it to have 20 merit. My point being that we are paying 21 BellSouth to provide us with a service. Okay. 22 We're paying rates approved by the commission in 23 some instances, in some instances we're paying 24 retail rates out of a special access tariff. 25 Okay. There should be some recourse for</p>

<p style="text-align: right;">Page 66</p> <p>1 BellSouth negligence either for NuVox or its end 2 users. BellSouth is blameless. It did not have 3 any exposure. 4 Q. Do you agree with me that the concept 5 of limitation of liability is to limit our 6 liability to each other? 7 A. That's correct. 8 Q. And if your liability, as set forth in 9 your contract or in a tariff, is limited to the 10 cost of a service that the customer failed to 11 obtain, regardless of whose fault it is, 12 wouldn't the appropriate standard be to recover 13 those costs that you failed -- I mean, those 14 services that you failed to provide to your end 15 user? 16 MR. CAMPEN: Objection to form. 17 A. As this market matures, we may be 18 forced to make changes to our customer contract 19 to win customers. NuVox can't have its 20 relationship with BellSouth chill its efforts to 21 win customers by precluding it from offering 22 more favorable liability terms to its customers 23 than BellSouth, our service provider, appears to 24 be willing to provide to NuVox. 25 Q. I appreciate your concern for what may</p>	<p style="text-align: right;">Page 68</p> <p>1 reading it. 2 A. Okay. 3 Q. Did you write this sentence? 4 A. I'm sure that I either amended or 5 edited this sentence because this -- the -- or 6 wrote it outright. I can't recall where in the 7 drafting of this testimony that we actually put 8 this in, but that -- my experience with the 9 government contracts that NewSouth provides 10 services to governmental contractors and I 11 negotiate our agreements with software -- our 12 software and licensing agreements, and these 13 percentages relate to some of those agreements. 14 So my answer would be, yes, this is my sentence. 15 Q. Did you review the actual government 16 contract prior to filing your testimony? 17 A. I look at governmental contracts from 18 time to time as we have had to integrate -- 19 actually file letters of novation with 20 governmental agencies because those contracts 21 were in the name of NewSouth Communications, so 22 yes. 23 (DEPOSITION EXHIBIT NO. 10 MARKED.) 24 Q. Show you what I'll mark as Exhibit 10. 25 A. Okay.</p>
<p style="text-align: right;">Page 67</p> <p>1 happen in the future. But today, the customer 2 either has a contract or a tariff, purchases 3 services from NuVox out of a contract or a 4 tariff, sues NuVox for the lack of service for 5 whatever reason. In your limitation of 6 liability as set forth in your tariff as it 7 exists today or in your contract says that the 8 only liability that you have for that outage is 9 to provide them for the credit for the services 10 they did not receive. Do you need a 7 and a 11 half percent liability cap against BellSouth for 12 that same act? 13 A. Possibly. Is BellSouth willing to 14 indemnify me for any credits that I have to give 15 to my end users based on BellSouth's negligence? 16 Do you want to go dollar for dollar? 17 MR. MEZA: You're not supposed to ask 18 me questions. This is the second time. Let's 19 take a break. 20 (BREAK.) 21 Q. Mr. Russell, I would like you to look 22 on page 25 of your direct testimony, lines 14 23 through 19 of Exhibit 1. 24 A. Okay. All right. 25 Q. And let me know when you're finished</p>	<p style="text-align: right;">Page 69</p> <p>1 Q. Do you recognize that response? 2 A. Appears to be a response to 3 interrogatories? 4 Q. Yes. 5 A. Uh-huh. 6 Q. And it asks you to identify all facts 7 and support -- facts and documents that support 8 the provision or the paragraph we just read? 9 A. Right. 10 Q. And is it fair to characterize that in 11 your response a litany of different articles -- 12 A. Uh-huh. 13 Q. -- and different sources are 14 identified? 15 A. Uh-huh. 16 Q. Is that a yes? 17 A. Yes. Yes. I'm sorry, yes. 18 Q. Did you review any of those documents 19 prior to filing your testimony? 20 A. I didn't read the Computer Law 21 Strategist. I think that these articles were 22 cited for the general legal principle that 23 parties in commercial agreements tend to shift 24 risks. 25 Q. It's not -- so those articles are not</p>

18 (Pages 66 to 69)

<p>Page 70</p> <p>1 used to support the percentages that you've 2 identified as far as what is reasonable? 3 A. No. 4 Q. Now, if you look on page 25, 5 lines 2 to 5 of your direct, you state that 6 the incremental costs are exposure for these 7 ordinary course, insurable risks for the 8 nonexistent are minimal to BellSouth beyond 9 possible costs incurred for the insurance 10 premiums, financial reserves and/or other 11 risk-management measures already maintained by 12 BellSouth in the usual conduct of its business, 13 costs that would in any event likely constitute 14 joint and common costs -- 15 A. Right. 16 Q. -- and already factored into the 17 BellSouth UNE rates? 18 A. Right. 19 Q. Are you familiar with the input 20 commissions used to calculate UNE rates? 21 A. Not specifically, no. 22 Q. What is a joint and common cost? 23 A. A joint and common cost, to my mind, 24 would be a cost that BellSouth spreads among 25 its -- for purposes of the interconnection</p>	<p>Page 72</p> <p>1 Q. Anything else? 2 A. That's it. 3 Q. Look on page 26. 4 A. Okay. 5 Q. Lines 23 following on page 27, lines 1 6 through 3, state that, starting on line 22, a 7 breach in the performance of services results in 8 losses that are greater than their wholesale 9 cost. These losses will ordinarily cost the 10 carrier far more in terms of direct liabilities 11 vis-a-vis those of their customers who are 12 relying on properly-performed services under 13 this Agreement. Do you see that? 14 A. Yes, that's my testimony. 15 Q. Under your tariff and end user 16 contracts, what is NuVox's direct liability as 17 to its customers? 18 A. Under our tariff, liability would be 19 for credit of the service amounts depending on 20 if there had been amendments to customer 21 contract, that amount, the exposure could be 22 greater. 23 The point of my testimony is this, 24 that when there is an error caused by BellSouth 25 that causes NuVox customers to lose service,</p>
<p>Page 71</p> <p>1 services group, is a cost of doing business with 2 CLECs. 3 Q. Is it your testimony that insurance 4 premiums, financial reserves, and other risk 5 management measures are included in or are 6 factored into BellSouth's UNE rates? 7 A. I would -- yes, it is, that's my 8 testimony. 9 Q. Okay. What is that based on? 10 A. Experience in BellSouth pricing docket 11 where it appeared that those types of costs were 12 included in BellSouth's coming up with its 13 proposed UNE prices that it put to the state as 14 part of the UNE price proceedings. 15 Q. Do you remember which documents you're 16 referring to? 17 A. I don't remember documents in 18 particular. 19 Q. Do you remember which state you're 20 looking at? 21 A. UNE pricing proceeding, South 22 Carolina. I believe I've seen UNE pricing 23 information from North Carolina, but I'm not 24 positive about that. Some of the states run 25 together.</p>	<p>Page 73</p> <p>1 oftentimes not only do we from a business point 2 to keep that customer happy, credit their 3 account for the service lost, we also provide 4 oftentimes good will credits in terms of some 5 number of months of free service. Those costs 6 are the costs I'm speaking of, as well as in 7 certain instances where customers have lost 8 service because of, let's say, a compromised 9 loop. BellSouth wins that customer back. I 10 lose the benefit of my bargain that customer for 11 the term of the agreement and the margins that I 12 would have made over the course of the term of 13 that agreement. So there are more costs to the 14 company. When there is a BellSouth service 15 error, it impacts NuVox customers. 16 Q. What percentage of time do you give a 17 NuVox customer something more than just a credit 18 of the services not received? 19 A. Over 25 percent of the time. 20 Q. So 75 percent you don't? 21 A. No, I said over 25. I'm sure there is 22 a number of instances, but I'm not certain how 23 high it goes. 24 Q. Are you speculating as to the 25 percentage?</p>

<p style="text-align: right;">Page 74</p> <p>1 A. That is my -- that's my best guess 2 right now. 3 Q. And it's a guess? 4 A. It's based on experience, so it's not 5 necessarily a guess. 6 Q. Is there any study as to -- that 7 you're aware of as to how often you provide 8 credits in excess? 9 A. I'm not aware of any study. I'm sure 10 there has been some analysis or at least someone 11 in our finance department has looked at the type 12 of credits that we're giving from time to time 13 Q. And isn't the cost of the service to 14 you less than the amount that you charge your 15 end user customer? 16 A. Yes. 17 Q. So when BellSouth gives you a 18 credit -- because you would agree with me that 19 you're entitled to a credit under BellSouth's 20 proposal for negligence that it causes, correct? 21 A. We could make a claim for a credit. 22 Whether we would get it or not is another issue. 23 We could make a claim for a credit, yes. 24 Q. So the credit you receive potentially 25 from your customer -- I mean from BellSouth is</p>	<p style="text-align: right;">Page 76</p> <p>1 A. Please produce all documents that 2 support, refer, relate, or pertain to the loss 3 of any end user or customers as result of any 4 alleged breach of performance by BellSouth. 5 (DEPOSITION EXHIBIT NO. 12 MARKED.) 6 Q. Show you what's marked as Exhibit 12. 7 And I will represent to you this is what NuVox 8 produced in response to Production No. 13. 9 (BREAK.) 10 Q. Have you had time to review that 11 information? 12 A. Absolutely. 13 Q. Would you agree with me that there is 14 no letter, reference included in that response 15 that is later than 1999? 16 A. That -- that's correct, yes. 17 Q. Would you agree with me that all of 18 the letters that are produced reference state 19 communications? 20 A. That's correct. 21 Q. And is it your position that every 22 single customer identified in the production in 23 response to No. 13 left NuVox as a result of 24 BellSouth -- 25 A. No. The letters that -- that -- that</p>
<p style="text-align: right;">Page 75</p> <p>1 less than the credit you are providing to your 2 customer; is that accurate? 3 A. If all that we provided the customer 4 was a credit for the lost -- their -- for the 5 service time of the outage, yes, that's correct. 6 Q. How many customers have you lost as a 7 result of BellSouth not performing under a 8 contract? 9 A. I can't give you any specifics, but I 10 know that it happens on occasion. 11 Q. And how frequently is that? 12 A. I couldn't give you a number on a per 13 month basis. 14 (DEPOSITION EXHIBIT NO. 11 MARKED.) 15 Q. Show you what's been marked as 16 Exhibit 11. It's Joint Petitioners' response to 17 BellSouth request for production No. 11. 18 A. Okay. 19 Q. Can you read what the request is -- or 20 excuse me, 13? 21 A. Yes. It says, please see attached 22 documents. 23 Q. Can you read the request? 24 A. Yes, I've already read it. 25 Q. Out loud.</p>	<p style="text-align: right;">Page 77</p> <p>1 reference customer issues to a host of account 2 team folks from Marc Cathey to who, Mike -- Mike 3 Bolding was one. We've been through a number -- 4 Mark Wilburn, I'm sorry, Tom Bolding were 5 indicative of the type problems that we had at 6 that time that caused us to lose some customers. 7 The fact that there are no letters from 1999 8 until today shouldn't be taken as we haven't 9 lost customers because of problems at BellSouth. 10 For instance, in the Pickens County 11 area in South Carolina, the BellSouth loops are 12 famously unreliable. We have lost a number of 13 customers in that area Haven't written Andrew 14 Cordarella, who is now our account team manager, 15 because writing account team managers didn't you 16 get you anywhere. 17 Q. The request asked you to produce 18 documents supporting the facts that you lost a 19 customer to BellSouth. 20 A. Uh-huh. 21 Q. The documents you produced relate to 22 state communications that are dated 1999 or 23 earlier. 24 A. Uh-huh. 25 Q. Are there any other documents</p>

<p style="text-align: right;">Page 78</p> <p>1 responsive to that request? 2 A. Not that I'm aware of. 3 Q. Is Pickens County a rural county? 4 A. Pretty rural. 5 Q. Was it a business or a residential 6 customer? 7 A. Business customer. Not pretty rural. 8 Pickens is rural. 9 Q. Does NuVox make a warranty, a 10 representation as to the quality or type of 11 service that it will provide? 12 A. We have a service level agreement, 13 yes. 14 Q. What is that? 15 A. Service level agreement indicates the 16 reliability of the service to a certain 17 percentage point, that's the -- say it's 5-9 for 18 liability, we have a service level agreement 19 that is provided to the customer. Also, in 20 customer contracts, the customer is provided 21 with a service guarantee that if they are not 22 satisfied with the service or the service 23 fails -- and I'm paraphrasing -- fails to live 24 up to their expectations in the original, I'm 25 not sure if it's 90 or 108 days, the customer</p>	<p style="text-align: right;">Page 80</p> <p>1 A. I think there are parameters in the 2 guarantee. I'm not sure what those are. 3 Q. How many customers have taken 4 advantage of the service guarantees? 5 A. I mean, I'm not sure of a number. I 6 do know that certain customers have done that in 7 the past. I don't have any number. 8 Q. How long has this guarantee been in 9 effect? 10 A. On the NewSouth side, for sometime. I 11 don't believe that NuVox had -- NuVox, prior to 12 the merger, had an analogous guarantee. We did 13 have a service level agreement. 14 Q. And the -- what are you guaranteeing, 15 that the service will work? 16 A. That they'll be completely satisfied 17 with the service. 18 Q. Are there instances where the customer 19 was not satisfied with the service as a result 20 of a matter that was unrelated to BellSouth 21 wholesale service used to provision service to 22 that customer? 23 A. Can you rephrase that one? 24 Q. Have there been instances where a 25 customer has invoked the service guarantee as a</p>
<p style="text-align: right;">Page 79</p> <p>1 can leave the NuVox service. 2 Q. Where is this service guarantee 3 document? 4 A. It's on the back of a new NuVox 5 customer service agreement. 6 Q. Is that a contract that NuVox 7 currently has? 8 A. Yes. 9 Q. And is offering? 10 A. Yes. 11 Q. How would a customer invoke the 12 service guarantee? 13 A. Contact NuVox. If NuVox fails to fix 14 the issue, the customer is released from the 15 contract. 16 Q. Give me an example. 17 A. Jim Meza's accounting office signs up 18 with NuVox. NuVox provisions the service. In 19 the first 90 days, they have a service issue 20 that NuVox cannot resolve in a timely fashion. 21 You can contact their NuVox account 22 representative and indicate they're switching 23 services and they're out of the contract. 24 Q. What's resolved in a timely manner? 25 Are there parameters?</p>	<p style="text-align: right;">Page 81</p> <p>1 result of not being satisfied in nonBellSouth 2 underlying services? 3 A. I believe there have been an instance 4 or two where a customer has invoked the 90 day 5 or 180 day, whichever it is, I can't recall 6 offhand, guarantee to go to a lower cost 7 provider. That would have nothing to do with 8 BellSouth. So that's an instance. 9 Q. Would you honor that guarantee? 10 A. We have, in certain instances, when 11 it's not worth fighting, if you will. We would 12 rather not. It's not a usual business practice. 13 Q. And do you have any understanding of 14 the magnitude of the number of customers that 15 have invoked this service? 16 A. I don't have any study giving me any 17 hard numbers, no. 18 Q. Have you sought to collect on any 19 credits that you were out pursuant to a service 20 guarantee by invoking your limitation of 21 liability rights under the current agreement 22 against BellSouth? 23 A. Tried to collect credits from 24 BellSouth? 25 Q. Yes.</p>

21 (Pages 78 to 81)

<p>Page 82</p> <p>1 A. For BellSouth related issues? 2 Q. Yes. 3 A. I don't believe so. 4 Q. Why not? 5 A. I'd have to ask the people that are in 6 charge of that. I'm not sure if we have, and 7 I'm just not certain about how to answer that 8 question. 9 Q. Do you have any tariffs or end user 10 contracts that do not contain any limitation of 11 liability language? 12 A. That could not contain any -- 13 Q. Do not. 14 A. That do not contain any limitation of 15 liability. Not that I'm aware of, no 16 Q. That would be a very smart business 17 move, wouldn't it? 18 A. Say again. 19 Q. Would that be a smart business move to 20 remove any limitation of liability? 21 A. You mean to have unlimited exposure? 22 Q. Yes. 23 A. I don't think that would be prudent. 24 Q. Do you consider BellSouth's proposed 25 limitation of liability language to be standard</p>	<p>Page 84</p> <p>1 equitable for the parties going forward. 2 Q. Do you believe that your current 3 language in your tariff is the standard? 4 A. The current language in our tariff is 5 our -- is the ceiling or the -- it is, as 6 traditionally provided for in tariffs, a base 7 line, if you will. It's not necessarily what we 8 do with all of our customers. 9 Q. And you've said that repeatedly today 10 and I'm not asking you specifics, but I think I 11 need to now. Are you aware of any instance 12 where you have conceded limitation of liability 13 language in order to obtain to customer? 14 A. I believe that there are government 15 contracts, as an example that require some 16 percentage of the amounts paid by the government 17 to be available in the event that they have a 18 claim against us, the service provider 19 Q. That's a government mandated 20 provision? 21 A. I believe so, yes. 22 Q. In a nongovernment mandated context, 23 are you aware of any specific instance where you 24 have conceded limitation of liability to obtain 25 a customer?</p>
<p>Page 83</p> <p>1 language in the industry? 2 A. You need to review the language. And 3 in what industry? 4 Q. Telecom industry. 5 A. For purposes of interconnection 6 agreements? 7 Q. Yes. 8 (DISCUSSION HELD OFF RECORD.) 9 MR. CAMPEN: Exhibit -- what exhibit 10 is that? 11 A. Exhibit 5. We're still talking about 12 Issue 4, right? 13 Q. Right. 14 A. BellSouth version? 15 Q. Yes. 16 A. Okay. 17 MR. CAMPEN: Do you want to go off? 18 THE WITNESS: Yes, go off. 19 (DISCUSSION HELD OFF RECORD.) 20 A. That appears to try to limit liability 21 for any damages or other costs or expenses that 22 are related to activities other than gross 23 negligence and willfulness conduct. That would 24 be my -- I would agree that that's probably the 25 current practice. I don't believe that it is</p>	<p>Page 85</p> <p>1 A. I believe that we have made changes to 2 our liability limitation language on occasion. 3 I don't know one off the top of my head. 4 Q. Do you know how long ago these changes 5 were made? 6 A. We make changes to contracts daily 7 depending on who we're competing with, what the 8 other provider's offering. So I don't have a 9 frequency of when that specific clause has 10 changed. 11 Q. So you have no -- no -- no idea as to 12 how often this happens, the changing of the 13 limitation liability language? 14 MR. CAMPEN: Objection, asked and 15 answered. 16 A. I don't believe that it is every day 17 or on every contract, but I believe that it 18 happens on occasion. 19 Q. And how would you define on occasion? 20 A. Once in a while. 21 Q. Once a year? 22 A. More than once a year. 23 Q. Ten times a year? 24 A. I don't know if it happens ten times a 25 year.</p>

<p style="text-align: right;">Page 86</p> <p>1 Q. How many contracts a month do you see 2 are you aware where NuVox has conceded some form 3 of limitation liability in a nongovernment 4 contract? 5 A. I see -- I might see one of every -- 6 keep in mind, I handle things in the southeast. 7 We have two lawyers in the midwest. I don't see 8 all of the customer contracts. I get requests, 9 as do people in our marketing department, for 10 addenda or amendments to the form of contract on 11 a daily basis. Some of those requests deal with 12 the liability limitation sections. 13 Q. How often do you see those addenda? 14 A. How often do I see addenda requests? 15 Every day. 16 Q. Related to limitation -- changes in 17 limitation liability? 18 A. That gets asked for maybe a couple 19 times a week. 20 Q. Does NuVox grant it all the time? 21 A. Not all the time. It depends on the 22 type of customer, the margins we'll receive, the 23 term of the agreement. A lot of factors go into 24 that analysis. 25 Q. So although you can't identify a</p>	<p style="text-align: right;">Page 88</p> <p>1 A. Yes. 2 Q. And you can take into account whether 3 or not you want to contract with this entity in 4 determining whether you should concede 5 limitation of liability; is that correct? 6 A. Yes. 7 Q. I'm sorry. 8 A. It's okay. 9 MR. MEZA: Can you read my last 10 question? 11 (THE COURT REPORTER READ BACK THE 12 REQUESTED PORTION OF THE RECORD.) 13 A. Yes. 14 Q. Does BellSouth have a choice as to 15 whether it can enter into a contract with NuVox? 16 A. My understanding is BellSouth had to 17 have interconnection agreements in place as part 18 of the 271 process. As far as I know, BellSouth 19 still provides long distance and that is part of 20 the criteria it has to meet, so it has a choice. 21 It can decide not to enter into interconnection 22 agreements and give up its long distance 23 approval. 24 Q. Is it your testimony that BellSouth 25 Telecommunications, Inc., provides long</p>
<p style="text-align: right;">Page 87</p> <p>1 specific instance, it's your testimony that it 2 has happened in the past? 3 A. It has happened in the past 4 Q. In those instances where you have 5 conceded limitation of liability language, have 6 you been sued by the end user? 7 A. Not that I'm aware of it. 8 Q. For those customers where you have 9 conceded limitation of liability language, has 10 BellSouth in some form or fashion done something 11 to injure or harm the customer? 12 A. No, not that I'm aware of today. 13 Q. Do you have any business plans to 14 remove limitation of liability language from 15 your tariffs or contracts? 16 A. No, but we do want the flexibility 17 when contracting with customers that if that is 18 the concession that wins the business and it is 19 a commercially reasonable decision on our part 20 to provide some sort of dispensation off of the 21 standard contractual language with regard to 22 liability limitations. 23 Q. You would agree with me that you have 24 a choice as to whether or not you want to enter 25 into a contract with a customer, correct?</p>	<p style="text-align: right;">Page 89</p> <p>1 distance? 2 A. I don't know what BellSouth's 3 subsidiary or affiliate provides long distance. 4 I know that BellSouth's annual report appeared 5 to receive a boost in revenues after that 271 6 approval was awarded. 7 Q. Under your interpretation of 251, does 8 BellSouth have an option of whether to enter 9 into an interconnection agreement with a CLEC? 10 A. My interpretation of 251 is that 11 BellSouth contracts to provide UNEs at TELRIC 12 prices to qualified CLECs. How that plays into 13 this issue, I don't know. 14 Q. Well, can BellSouth say, I'm not 15 entering into a contract with you, NuVox, under 16 under Section 251? 17 A. I don't believe so. 18 Q. Is it your understanding, as it 19 relates to Issue 5, that BellSouth's position is 20 that you have to incorporate its limitation of 21 liability language into the agreement? 22 A. Not necessarily. My understanding of 23 Issue 5, and I may need to look at my testimony 24 to make sure we're talking about right issue, is 25 that if there is liability to BellSouth that</p>

23 (Pages 86 to 89)

<p>Page 90</p> <p>1 BellSouth contends and proves, is only the 2 result of NuVox's failure to have the same or 3 similar terms in its tariff or customer service 4 agreement that NuVox then basically indemnifies 5 BellSouth. 6 Q. Look on page 29 of your direct 7 testimony, lines 21 through 23. BellSouth has 8 proposed language that would require Petitioners 9 to ensure that their tariffs and contracts 10 include the same limitation of liability terms 11 that BellSouth achieves in its own agreements. 12 Do you see that? 13 A. Yeah. 14 Q. Is that an accurate reflection of your 15 understanding of BellSouth's position in 16 proposed language? 17 A. BellSouth's position results in that 18 BellSouth's position that NuVox must indemnify 19 BellSouth in the event that BellSouth has any 20 financial exposure would require NuVox and the 21 other Joint Petitioners to have the exact same 22 language and protections that BellSouth has in 23 its tariffs. Basically, you're asking us to 24 guarantee that you don't have any financial 25 exposure.</p>	<p>Page 91</p> <p>1 Q. Would incorporation or maintenance of 2 your current limitation of liability language in 3 your tariffs satisfy BellSouth's language? 4 A. I don't know. 5 Q. Do you think that your current 6 limitation of liability language in your 7 tariffs -- 8 A. Yes 9 Q. -- is the maximum extent permitted by 10 applicable law? 11 A. I believe that it is 12 Q. Would an agreement by the companies to 13 state that the limitation of liability language 14 as it exists in the respective tariffs today be 15 sufficient to resolve this issue? 16 A. That's a possibility. I haven't been 17 presented with that proposal to consider it. 18 Q. BellSouth doesn't have authority to 19 offer it, but. 20 A. It's a possibility. 21 Q. Do you know if your current contract 22 contains a similar provision? 23 A. To what provision? 24 Q. I'm sorry, 10.4.2. I'm trying to get 25 you that. And the question on the table is</p>	<p>Page 92</p> <p>1 whether or not this identical provision appears 2 in your current agreement? 3 A. You're talking about current 4 interconnection agreement? 5 Q. Yes. 6 A. I thought you're talking about our 7 current customer service agreement. 8 Q. Oh, no, no, your current 9 interconnection agreement. 10 A. I don't know what's in our current 11 interconnection agreement. My guess is this is 12 BellSouth version and it hasn't changed much 13 from its template. It's probably roughly 14 analogous to what we currently have in our 15 agreement. 16 Q. Have you ever had an issue with 17 BellSouth over this issue? 18 A. We have one now. 19 Q. As it relates to your current 20 interconnection agreement? 21 A. Not that I'm aware of. 22 Q. Look on page 31 of your North Carolina 23 direct, line 17 to 20. 24 A. Okay. 25 Q. You state that Petitioners have</p>	<p>Page 93</p> <p>1 already made clear that they will indemnify 2 BellSouth against any loss resulting from their 3 own failure to obtain limits -- liability 4 language that does not accord with the 5 commercial reasonableness and duties of 6 mitigation otherwise required of them under the 7 agreement. 8 A. Uh-huh. 9 Q. What does this means? 10 A. It means that in the event that -- the 11 parties -- the Joint Petitioners don't want to 12 be required to guarantee BellSouth that the 13 language in our tariffs will fully absolve you 14 from any potential liability. What this 15 language is trying to testify to is, if we put 16 some language that's just ridiculous in our 17 tariff that doesn't provide any protection to 18 NuVox but also to BellSouth, that's an 19 indemnification issue that's appropriate. We're 20 going to use commercially reasonable effort to 21 limit our exposure and in a sense in turn limit 22 BellSouth's. What we can't do is guarantee via 23 this interconnection agreement that our efforts 24 in that regard will completely insulate 25 BellSouth from liability, which appears to be</p>
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<p style="text-align: right;">Page 94</p> <p>1 what BellSouth is looking for. 2 Q. Do you agree with me that this is only 3 an issue -- this issue only becomes an issue if 4 you decide to deviate from your standard 5 limitation of liability language in your tariff 6 or contract? 7 A. It becomes an issue if some lawsuit is 8 filed against NuVox and BellSouth is included as 9 a party defendant in that lawsuit. And related 10 to this interconnection agreement, there's 11 exposure both jointly and severally to BellSouth 12 and NuVox. And then BellSouth in turn contends 13 via cross claim that the whole reason that 14 BellSouth is part of this lawsuit and has any 15 exposure is that NuVox was negligent in 16 maintaining its tariffs or customer contracts. 17 I don't know if that the language that 18 we use now in our tariffs does what I think it 19 does or a judge would agree with me that it does 20 what I think it does. I believe that it is very 21 strong and protects NuVox from unlimited 22 exposure. Would a judge in federal court agree 23 to that? I don't know. 24 Q So it's not been judicially tested? 25 A. As far as I know, no.</p>	<p style="text-align: right;">Page 96</p> <p>1 Q. Would you agree with me that this 2 agreement is between BellSouth and NuVox? 3 A. Yes. 4 Q. And that this agreement is not between 5 BellSouth and NuVox's end users? 6 A. It is not between BellSouth and 7 NuVox's customers; however, it is -- it does 8 impact NuVox's customers because of the 9 underlying loops and other services that NuVox 10 purchases from BellSouth. 11 Q. Is it your understanding that you can 12 bind your end users in your contract with 13 BellSouth? 14 A. Yes. 15 Q. Under what ground? 16 A. That I can bind my end users to my 17 contract? Oh, I'm sorry. 18 Q. Can you bind your end users via your 19 contract with BellSouth, NuVox's contract? 20 A. Can I bind my end user with this 21 contract? 22 Q. Yes. 23 A. I don't think I can, but I haven't, 24 you know, sought an opinion letter saying 25 whether I can or can't.</p>
<p style="text-align: right;">Page 95</p> <p>1 Q. And just to make sure I understand, 2 there has been no instance to date where that 3 scenario that you just described has occurred? 4 A. No. 5 Q. What type of language would not accord 6 with commercial reasonableness in duties of 7 litigation? Just so that BellSouth has an 8 understanding of what you're talking about 9 A. Language that would -- poorly drafted 10 and not provide liability protections. 11 Q. So you intend to have some form of 12 limitation liability as a business practice? 13 A. Yes. 14 Q. Do you have any intention to changing 15 your limitation liability language that 16 currently exists in your tariffs? 17 A. Not that I'm aware of, no. 18 Q. Okay. What is indirect, 19 consequential, or incidental damages? 20 A. In what -- in what context? 21 Q. Your understanding of what those terms 22 mean as it relates to this interconnection 23 agreement? 24 A. As it relates to this interconnection 25 agreement, would be unforeseeable damages.</p>	<p style="text-align: right;">Page 97</p> <p>1 Q. Do you think that you can grant your 2 end users' rights against BellSouth via this 3 agreement? 4 A. No. But in the same regard, I can't 5 prevent anybody from going out and filing a 6 lawsuit against NuVox and BellSouth. 7 Q. Do you believe that NuVox should be 8 liable for damages that are the direct and 9 foreseeable result of its actions? 10 A. I don't see why not. 11 Q. Is NuVox insulated from indirect, 12 consequential -- or incidental damages from its 13 own end users in its tariff? 14 A. In the tariff, yes. 15 Q. What about contracts? 16 A. Unless amended, the contracts 17 incorporated tariffs, so yes. 18 (DEPOSITION EXHIBIT NO. 13 MARKED.) 19 Q. I would like for you to look at 20 Section 10.4.4 of Exhibit 13. Is it correct to 21 state that your language gives either your end 22 users or NuVox vis-a-vis its end users a right 23 to claim indirect, consequential, or incidental 24 damages from BellSouth? 25 A. Not necessarily, no. Let me look at</p>

25 (Pages 94 to 97)

<p style="text-align: right;">Page 98</p> <p>1 it first of all. Okay. It provides that both 2 the Joint Petitioners and BellSouth may be 3 liable for damages that are reasonably 4 foreseeable. It does exclude indirect, 5 incidental, and consequential damages. 6 Q. That's not the way I read it. 7 A. Okay. 8 Q. Let's see if we can hammer down into 9 it. 10 A. Okay. 11 Q. The first sentence, would you agree 12 with me, states that nothing in Section 10 shall 13 limit each party's obligation to indemnify or 14 hold harmless the other party? 15 A. Yes. 16 Q. Okay. And in excepting cases of gross 17 negligence or willfulness conduct, under no 18 circumstances shall a party be responsible for 19 liable -- or liable for indirect, incidental or 20 consequential damages. Do you see? 21 A. Uh-huh. 22 Q. Would you agree with me that that 23 means that unless -- well, that if it's a 24 negligent act, no party would be responsible for 25 indirect, incidental, or consequential damages?</p>	<p style="text-align: right;">Page 100</p> <p>1 the damages -- actual damages are the direct 2 result and reasonably foreseeable. The one 3 party's nonperformance, those damages would be 4 available to the end user/customer or the party 5 by way of its end users. 6 Q. Okay. Well, let me give you a 7 hypothetical. 8 A. Okay. 9 Q. BellSouth does some act that causes 10 your end users to experience some type of 11 damage. Okay? 12 A. (Witness nods head up and down.) 13 Q. And these damages result directly and 14 in a reasonably foreseeable manner from 15 BellSouth's performance of services under this 16 contract. In that instance, would your end 17 users be entitled to receive indirect, 18 incidental, or consequential damages from 19 BellSouth? 20 A. No. 21 Q. Why not? 22 A. Only the actual damages that were a 23 direct result of the act and were reasonably 24 foreseeable. Because it says -- you know, I'm 25 assuming this just is in the case of negligence.</p>
<p style="text-align: right;">Page 99</p> <p>1 A. That's right. 2 Q. All right. Now, starting with the 3 bolded word provided. Provided that neither the 4 foregoing nor any other provision of this 5 Section 10 shall be deemed or construed as 6 imposing any limitation on the liability of a 7 Party for claims or suits for damages incurred 8 by End Users of the Party or by such other Party 9 vis-a-vis its End Users to the extent such 10 damages result directly and in a reasonably 11 foreseeable manner from the first Party's 12 performance of services and hereunder. All 13 right. Would you agree with me that that 14 sentence -- long sentence -- 15 A. Uh-huh. 16 Q. -- means that there is no limitation 17 of liability, and, for instance, let's say 18 BellSouth -- for BellSouth for claims or suits 19 for damages incurred by your end users or by 20 NuVox on behalf of its end users to the extent 21 such damages result directly in a reasonably 22 foreseeable manner from BellSouth's performance? 23 A. No. 24 Q. Why not? 25 A. I think that the section operates that</p>	<p style="text-align: right;">Page 101</p> <p>1 Q. Yeah. 2 A. Under no circumstances shall a party 3 be responsible or liable for indirect, 4 incidental, or consequential damages provided 5 that neither of the foregoing nor any other 6 provision of this section 10 shall be deemed or 7 construed as imposing limitation liability to 8 the extent such damages are -- result directly 9 and reasonably foreseeable manners -- or manner 10 from the first party's performance. Maybe 11 there's a theoretical disconnect there. That's 12 the way I see that section operating. 13 Q. That clause provided that neither the 14 foregoing nor any other provision of Section 10 15 shall be deemed or construed as imposing any 16 limitation of liability. Doesn't that mean that 17 no matter what's said, the first two sentences, 18 that they don't apply to the instance where your 19 end user sustains damages as a result of the 20 BellSouth action that's directly and reasonably 21 foreseeable from BellSouth's performance under 22 the contract? 23 A. I'm not disagreeing with your train of 24 thought here. 25 Q. What are you trying -- what you trying</p>

<p style="text-align: right;">Page 102</p> <p>1 to get here so that we're not fighting over 2 misinterpretation? 3 A. Consider -- this is total package. 4 All of these issues are a package. Okay. But 5 conceptually, the idea that if in the event that 6 BellSouth's negligent and that negligence 7 directs -- is directly related -- that 8 negligence directly causes reasonably 9 foreseeable actual damages to a group of 10 customers, they would have the ability to 11 recover those actual damages. Maybe we need to 12 insert the word actual. 13 Q. So you're not intending with this 14 provision to provide your end users with the 15 ability to obtain indirect, consequential -- 16 A. That's exactly right, not intending 17 that at all. 18 Q. Okay. Well, I will tell you BellSouth 19 does not have that interpretation of your 20 language. 21 A. I'm sure there are other 22 misconceptions by both parties. 23 Q. So this provision that you've added is 24 intended to limit your end users recovery for 25 actual damages sustained?</p>	<p style="text-align: right;">Page 104</p> <p>1 A. I want this Commission to approve a 2 thoughtful, meaningful package of liability 3 limitations of shifting the risks and most 4 definitely a more equitable indemnification 5 provision. 6 Q. Let me make sure I'm clear before we 7 wrap up today. 8 A. Okay. 9 Q. In 10.4.4 you're not asking for 10 BellSouth to be liable to your customers for 11 indirect, consequential, and incidental damages; 12 is that correct? 13 A. That's correct in the sense that 14 there's no intention by the Joint Petitioners to 15 have unlimited exposure for either party. 16 Q. Well, I want to make sure we're clear 17 on the actual question I asked you. 18 A. Okay. 19 Q. Is it the Joint Petitioners' intention 20 to provide their end users or customers or 21 whatever phrase you want to use with the ability 22 to obtain indirect, inconsequential or -- excuse 23 me, indirect, incidental, or consequential 24 damages from BellSouth? 25 A. From that simple negligence?</p>
<p style="text-align: right;">Page 103</p> <p>1 A. Ours or yours? 2 Q. Why do you even need this provision in 3 a contract between BellSouth and NuVox? 4 A. BellSouth commits some act or fails to 5 act in some regard that results in damages, 6 actual damages for NuVox, we should be able to 7 recover from BellSouth. We're purchasing a 8 service. And keep in mind that that recovery 9 would be limited to 7.5 percent the day the 10 claim arose 11 Q. You would agree with me that the 12 limitation of liability language is 10.4.1 is in 13 Section 10? 14 A. Yes. 15 Q. And that in 10.4.4 you state that 16 nothing in Section 10 or that neither the 17 foregoing or any other provision of Section 10 18 shall be deemed or construed as imposing any 19 limitation on liability of party? 20 A. The section as drafted says what it 21 says, and maybe you and I are going to disagree 22 what the Joint Petitioners intended to do. 23 Maybe it's not artfully drafted. 24 Q. Do you want this Commission to approve 25 your language?</p>	<p style="text-align: right;">Page 105</p> <p>1 Q. For any act? 2 A. My understanding, NuVox's, that is not 3 our intention. 4 Q. Is it your intention that the language 5 in 10.4.4 would eviscerate the limitation of 6 liability language proposed by the Joint 7 Petitioners? 8 A. No. That there would be always be a 9 7.5 percent cap for simple negligence, for gross 10 negligence and willful misconduct. 11 Q. And I don't think the parties dispute 12 that. 13 A. Okay. Okay. Okay. 14 Q. Why is it that you believe that you 15 need to carve out or provide certain rights to 16 your end users with 10.4.4 with this agreement 17 between NuVox and BellSouth? 18 A. Hypothetically speaking, our concern 19 is the situation where BellSouth, through 20 negligent act or omission, reading these 21 sections in their totality, causes some direct 22 damage -- actual damages to our end users, 23 customers. They should not be denied some 24 remedy and have as their only remedy NuVox's -- 25 a target on NuVox.</p>

<p style="text-align: right;">Page 106</p> <p>1 Q. Do you think whatever you put into 2 this contract will determine what rights your 3 end users ultimately have against BellSouth? 4 A. I don't know. 5 Q. Let me give you a hypothetical. NuVox 6 end user sustains some type of damage as a 7 result of BellSouth not provisioning a loop on 8 time. All right. Under your tariff, what is 9 your maximum exposure for that? 10 A. Without any amendments to contracts, 11 hypothetical would be the credit for the number 12 of days without service. 13 Q. Under your provision, your language in 14 10.4.4, would that end user have any other 15 recourse against NuVox? 16 A. If NuVox was blameless in the 17 transaction, no. If NuVox delayed in getting 18 the order to BellSouth or order confirmation 19 from BellSouth for provisioning on its behalf, 20 it would have exposure. 21 Q. And in that hypothetical, what would 22 NuVox's remedies be against BellSouth? 23 A. Depends on what the indemnification 24 provisions of the agreement are, but I would 25 like to think that we would be able to dollar</p>	<p style="text-align: right;">Page 108</p> <p>1 Q. We can fight about that later. And 2 then you're trying to create a right for your 3 end user -- or an avenue for your end user to 4 sue BellSouth for the actual damages, would 5 BellSouth be subject to triple dipping for the 6 same act? 7 A. No. That would be a situation where 8 the customer would already have received a 9 credit, be precluded from bringing suit. 10 Q. Give me an example where you think 11 this provision would actually play out. 12 A. Oh, I don't know. Example would be 13 BellSouth provided a business listing in the 14 yellow page. Error on BellSouth. Negligence 15 standard. Customer claims lost business 16 revenues related on failure to get in the phone 17 book. Can prove those damages based on lost 18 business receipts for a year it was in the phone 19 book as opposed to the year it was not in the 20 phone book. Makes a claim against NuVox. 21 Clearly in that regard, BellSouth would have 22 been acting as NuVox's agent to put that 23 information in the phone book. NuVox had 24 provided -- can show through its records that it 25 has provided BellSouth with completely accurate</p>
<p style="text-align: right;">Page 107</p> <p>1 for dollar get a credit on our next month's bill 2 for our exposure. 3 Q. In that situation, you believe your 4 end user should be given a right in this 5 contract to sue BellSouth directly for its 6 actual damages incurred as a result of not 7 provisioning that loop? 8 A. I don't know if given a direct right 9 is the way to put it. Have an avenue for -- to 10 have that issue addressed. 11 Q. Why do you think you need to that with 12 this contract between BellSouth and NuVox? 13 A. This, in my mind, is an outgrowth of 14 BellSouth's request that NuVox guarantee that it 15 can -- it will provide protections for BellSouth 16 against any end user's claims, and in the event 17 that an end user brings a claim that NuVox and 18 Joint Petitioners indemnified BellSouth from any 19 claim no matter how frivolous it is. I don't 20 know how to address your question in a vacuum. 21 Q. Well, in situation where you give the 22 credit to the end user, we give the credit back 23 to you, presumably we pay penalties for failure 24 to deliver the loop? 25 A. Presumably.</p>	<p style="text-align: right;">Page 109</p> <p>1 information. And through fat fingers or just 2 failure to get it in, it doesn't get in. My 3 argument would be that customer should have a 4 cause of action against BellSouth. 5 Q. And do you think by including the 6 language that you're proposing in 10.4.4 you are 7 guaranteeing or doing anything? 8 A. I'm not guaranteeing anything. I'm 9 making a counterproposal to BellSouth's 10 position. I'm not guaranteeing anything. 11 Q. For the benefit of your end user? 12 A. I'm not guaranteeing anything for the 13 customer. 14 Q. You are providing them -- you're 15 seeking to preserve certain claims that they may 16 have against BellSouth, correct? 17 A. The hypothetical you just asked me to 18 provide, for the benefit of the court reporter, 19 the customer would be allowed -- they can bring 20 an action against BellSouth anyway. They 21 wouldn't be precluded under my contract by 22 something I did and then turn around and sue me 23 for it. 24 Q. I don't understand that last part. 25 How would your customer be precluded from suing</p>

Page 110	Page 112																																																																
<p>1 BellSouth in any instance?</p> <p>2 A. They wouldn't. Anybody can sue anyone</p> <p>3 at anytime for any reason.</p> <p>4 Q. Regardless of what's sets forth in</p> <p>5 10.4.4 between NuVox and BellSouth?</p> <p>6 A. They could, under the BellSouth</p> <p>7 proposal, despite -- in my hypothetical, all the</p> <p>8 wrong being on BellSouth's side of the ledger, I</p> <p>9 would be responsible for it and I would have to</p> <p>10 indemnify BellSouth for their poor performance.</p> <p>11 Q. Would all this go away if we had</p> <p>12 mutual indemnification obligations?</p> <p>13 A. That's a possibility.</p> <p>14 MR. MEZA: All right. Let's close</p> <p>15 today.</p> <p>16 (Signature reserved.)</p> <p>17 (The deposition recessed at 5:30 p.m.)</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 SIGNATURE</p> <p>2 I, HAMILTON RUSSELL, do hereby state under oath</p> <p>3 that I have read the above and foregoing</p> <p>4 deposition in its entirety and that the same is</p> <p>5 a full, true and correct transcript of my</p> <p>6 testimony.</p> <p>7 Signature is subject to corrections on attached</p> <p>8 errata sheet, if any</p> <p>9</p> <p>10 HAMILTON RUSSELL</p> <p>11</p> <p>12 State of _____</p> <p>13 County of _____</p> <p>14 Sworn to and subscribed before me this</p> <p>15 _____ day of _____, 2005</p> <p>16</p> <p>17 Notary Public</p> <p>18</p> <p>19 My commission expires _____</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>																																																																
<p>1 ERRATA SHEET</p> <p>2</p> <p>3 Case name. In the Matter of</p> <p>4 Joint Petition NewSouth</p> <p>5 Communications Corp , et al. for</p> <p>6 Arbitration with BellSouth</p> <p>7 Telecommunications, Inc</p> <p>8</p> <p>9 Deponent HAMILTON RUSSELL</p> <p>10 Date: December 14, 2004</p> <p>11</p> <table border="1"><thead><tr><th>PAGE</th><th>LINE</th><th>READS</th><th>SHOULD READ</th></tr></thead><tbody><tr><td>11</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>12</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>13</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>14</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>15</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>16</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>17</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>18</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>19</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>20</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>21</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>22</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>23</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>24</td><td>_____</td><td>_____</td><td>_____</td></tr><tr><td>25</td><td>_____</td><td>_____</td><td>_____</td></tr></tbody></table>	PAGE	LINE	READS	SHOULD READ	11	_____	_____	_____	12	_____	_____	_____	13	_____	_____	_____	14	_____	_____	_____	15	_____	_____	_____	16	_____	_____	_____	17	_____	_____	_____	18	_____	_____	_____	19	_____	_____	_____	20	_____	_____	_____	21	_____	_____	_____	22	_____	_____	_____	23	_____	_____	_____	24	_____	_____	_____	25	_____	_____	_____	<p>1 CERTIFICATE</p> <p>2 State of North Carolina</p> <p>3 County of Wake</p> <p>4 I, Sarah K Mills, a notary public in and for</p> <p>5 the State of North Carolina, do hereby certify</p> <p>6 that there came before me on the 14th day of</p> <p>7 December, 2004, the person hereinbefore named,</p> <p>8 who was by me duly sworn to testify to the truth</p> <p>9 and nothing but the truth of his knowledge</p> <p>10 concerning the matters in controversy in this</p> <p>11 cause, that the witness was thereupon examined</p> <p>12 under oath, the examination reduced to</p> <p>13 typewriting by myself, and the deposition is a</p> <p>14 true and accurate transcription of the testimony</p> <p>15 given by the witness</p> <p>16 I further certify that I am not counsel for, nor</p> <p>17 in the employment of any of the parties to this</p> <p>18 action, that I am not related by blood or</p> <p>19 marriage to any of the parties, nor am I</p> <p>20 interested, either directly or indirectly, in</p> <p>21 the results of this action</p> <p>22</p> <p>23 In witness whereof, I have hereto set my hand</p> <p>24 and affixed my official notarial seal, this the</p> <p>25 27th day of December, 2004</p> <p>26</p> <p>27 Sarah K Mills</p> <p>28 Notary Public</p> <p>29 My commission expires 11/16/08</p> <p>30</p> <p>31</p> <p>32</p> <p>33</p> <p>34</p> <p>35</p>
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BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-772, Sub 8
Docket No. P-913, Sub 5
Docket No. P-989, Sub 3
Docket No. P-824, Sub 6
Docket No. P-1202, Sub 4

COPY

In the Matter of)
)
Joint Petition NewSouth)
Communications Corp., et al. for)
Arbitration with BellSouth)
Telecommunications, Inc.)

Raleigh, North Carolina
Wednesday, December 15, 2004
Deposition of HAMILTON RUSSELL,
VOLUME II

a witness herein, called for
examination by counsel for BellSouth, in
the above-entitled action, pursuant to
Notice, the witness being duly sworn by
Nicole Ball Fleming, Court Reporter and
Notary Public in and for the State of
North Carolina, taken at the offices of
Parker Poe Adams & Bernstein, 150
Fayetteville Street Mall, Suite 1400,
Raleigh, North Carolina, beginning at 9:20
a.m., on Wednesday, December 15, 2004,
such proceedings being taken
stenographically by Nicole Ball Fleming.

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1 APPEARANCES OF COUNSEL	
2	
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1 STIPULATIONS	
2 Prior to examination of the witness,	
3 counsel for the parties stipulated and	
4 agreed as follows	
5 1. Said deposition shall be taken for	
6 the purpose of discovery or for use as	
7 evidence in the above-entitled action or	
8 for both purposes, as permitted by the	
9 applicable rules of civil procedure,	
10 2. Any objections of any party hereto as	
11 to Notice of the taking of said deposition	
12 or as to the time and place thereof or as	
13 to the competency of the person before	
14 whom the same shall be taken are hereby	
15 waived,	
16	
17 3. Objection to questions and motions to	
18 strike answers need not be made during the	
19 taking of this deposition, but may be made	
20 for the first time during the progress of	
21 the trial of this case, or at any pretrial	
22 hearing held before the Judge for the	
23 purpose of ruling thereon or at any other	
24 hearing of said case at which said	
25 deposition might be used, except that an	
objection as to the form of a question	
must be made at the time such question is	
asked or objection is waived as to the	
form of the question,	
4. That all formalities and requirements	
of the Statute with respect to any	
formalities not herein expressly waived	
are hereby waived, especially including	
the right to move for the rejection of	
this deposition before trial for any	
irregularities in the taking of the same,	
either in whole or in part or for any	
other cause,	
5. That the sealed original transcript	
of this deposition shall be mailed	
first-class postage or hand-delivered to	
the party taking the deposition or its	
attorney for preservation and delivery to	
the Court, if and when necessary	

	Page 118
1 HAMILTON RUSSELL,	
2 having been duly sworn,	
3 testified as follows:	
4 DIRECT EXAMINATION	
5 BY MR. MEZA:	
6 Q. Good morning, Mr. Russell.	
7 A. Good morning.	
8 Q. Focus your attention on the exhibit	
9 containing the general terms and	
10 conditions, 13.	
11 A. Okay.	
12 Q. And if you'd look at the section dealing	
13 with indemnification, I would appreciate	
14 that, which is --	
15 A. 10.5.	
16 Q. -- 10.5.	
17 A. I'm there.	
18 Q. And after you've had a chance to review	
19 it, let me know. Your proposal.	
20 A. Okay.	
21 Q. Did you draft this language?	
22 A. Yes, I did.	
23 Q. The language as it exists right there?	
24 A. As with other sections of the agreement,	
25 we -- the Joint Petitioners put together	

<p>Page 119</p> <p>1 language in response to the BellSouth 2 template agreement. I don't think this 3 was our original proposal, but it is a 4 modified version, probably with many 5 changes from our original proposal, and 6 this is the final version of what was 7 drafted by the group. I include myself in 8 that group.</p> <p>9 Q. Okay. Have you seen a similar type of 10 indemnification provision in any 11 interconnection agreement?</p> <p>12 A. I can't say that I have.</p> <p>13 Q. And you have similar language in your 14 end-user contracts or tariffs?</p> <p>15 A. In certain -- In the tariff, the 16 indemnification is in favor of NuVox, but 17 in our end-user contracts, we will amend 18 the indemnification to provide for mutual 19 indemnification.</p> <p>20 Q. I believe we had this discussion yesterday 21 regarding limitation of liability --</p> <p>22 A. Yes.</p> <p>23 Q. -- or the frequency of such addendums. 24 Do you know how often that would 25 occur as far as indemnification goes?</p>	<p>Page 121</p> <p>1 Q. Let's say that a NuVox end user sues 2 BellSouth --</p> <p>3 A. Uh-huh.</p> <p>4 Q. -- and gets a judgment. Under 5 your understanding of mutual 6 indemnification, would BellSouth have 7 indemnification rights against NuVox?</p> <p>8 A. Possibly in the event that NuVox was at 9 fault and NuVox's negligence caused 10 BellSouth to have exposure.</p> <p>11 Q. What about if a BellSouth end user sues 12 NuVox, what would NuVox's indemnification 13 rights be against BellSouth in that 14 instance under a mutual indemnification 15 provision?</p> <p>16 A. I don't know how NuVox would have any 17 contractual relationship with a BellSouth 18 end user. But the situation that -- where 19 a NuVox customer may or may not sue 20 BellSouth, it would be based, I would 21 expect, on some theory that the underlying 22 facilities or services that BellSouth 23 provided to NuVox pursuant to this 24 interconnection agreement were provided 25 negligently or -- or by some -- there</p>
<p>Page 120</p> <p>1 A. That is -- That's commonly done in 2 certain customer contracts. Also in --</p> <p>3 we have an indirect channel that we sell 4 our services through dealers, not much 5 different in some regards than the 6 arrangement that we have with BellSouth 7 They are reselling our services, and we 8 commonly, I would say as much as 30 to 40 9 percent of the time, have mutual 10 indemnification --</p> <p>11 Q. And --</p> <p>12 A. -- in those agreements.</p> <p>13 Q. -- what do you mean by mutual 14 indemnification?</p> <p>15 A. I'd have to -- I'd have to look at the 16 section, but the parties agree that in the 17 event that there is a -- it's an 18 indemnification to hold harmless agreement 19 that if the parties are subject to claims 20 by a third party, they'd agreed to hold 21 each other harmless in the event that one 22 party is at fault and some exposure lies 23 on that -- the other party to the 24 agreement, that there will be 25 indemnification in that instance.</p>	<p>Page 122</p> <p>1 was some fault on behalf of BellSouth. 2 I don't understand a situation -- 3 how a BellSouth end user with no 4 independent relationship with NuVox could 5 file a lawsuit against NuVox for any 6 reason.</p> <p>7 Q. You can't envision any instance?</p> <p>8 A. I mean, I can't right now. Maybe it's 9 because it's early, but -- can you give me 10 a scenario?</p> <p>11 Q. Well, the situation that you described in 12 Nashville, the lawsuit where the person 13 who wasn't a customer of anyone sued 14 BellSouth and --</p> <p>15 A. That's a good example.</p> <p>16 Q. -- and NuVox.</p> <p>17 A. Under the -- I don't believe that in that 18 scenario, BellSouth or NuVox, the lawsuit 19 situation we were talking about yesterday, 20 either party would be responsible to the 21 other party.</p> <p>22 Q. Is there any instance in a mutual 23 indemnification provision where NuVox 24 would indemnify BellSouth?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 123</p> <p>1 Q. Can you please describe it?</p> <p>2 A. Imagine a situation where NuVox was</p> <p>3 provisioning service to a customer on a</p> <p>4 customer premise, NuVox technicians</p> <p>5 commits -- or do something or failed to do</p> <p>6 something they should have done, causes a</p> <p>7 customer damages. The customer may file a</p> <p>8 lawsuit against NuVox and BellSouth</p> <p>9 related to the relationship with the</p> <p>10 interconnection agreement.</p> <p>11 In that scenario, I don't believe</p> <p>12 that BellSouth would have any exposure.</p> <p>13 And if the judgment was entered against</p> <p>14 BellSouth, I believe that NuVox, if its</p> <p>15 technicians were solely at fault, that</p> <p>16 would be a situation that -- where</p> <p>17 indemnification might be appropriate.</p> <p>18 Q. If an end user sues NuVox, is it your</p> <p>19 intention for BellSouth to indemnify you?</p> <p>20 A. If BellSouth is solely at fault, yes.</p> <p>21 Q. If --</p> <p>22 A. Say, for example, that BellSouth is on</p> <p>23 notice that certain facilities are</p> <p>24 compromised and fails to take action to</p> <p>25 fix those facilities and the customer's</p>	<p style="text-align: right;">Page 125</p> <p>1 language is language that currently exists</p> <p>2 in your contracts?</p> <p>3 A. That's immaterial. We're negotiating a</p> <p>4 new contract.</p> <p>5 Q. If it's in your contract, wouldn't you</p> <p>6 agree that -- today that you've apparently</p> <p>7 previously agreed to this language?</p> <p>8 A. If it's in our contract that was related</p> <p>9 to different negotiations, different set</p> <p>10 of circumstances under which NuVox decided</p> <p>11 not to go into arbitration, those terms</p> <p>12 were essentially contracted adhesions that</p> <p>13 we entered into in the year 2000. It's a</p> <p>14 different time, and we are in arbitration</p> <p>15 because we disagree with this language.</p> <p>16 Q. You're characterizing your execution of</p> <p>17 the contract of 2000 then as a contract of</p> <p>18 adhesion?</p> <p>19 A. Yes.</p> <p>20 Q. So you were forced to sign that contract?</p> <p>21 A. Not necessarily forced to sign it, but</p> <p>22 there were certain terms and conditions</p> <p>23 that we could not have changed and</p> <p>24 BellSouth was unwilling to change. If</p> <p>25 BellSouth's unwilling to change contract</p>
<p style="text-align: right;">Page 124</p> <p>1 cause of action alleges those facts and</p> <p>2 those are proven. And, through no fault</p> <p>3 of NuVox, the compromised facilities were</p> <p>4 the cause of the damages to the customer</p> <p>5 and a judgment is entered against NuVox,</p> <p>6 in that instance, in my mind, BellSouth</p> <p>7 should indemnify NuVox.</p> <p>8 Q. Do you indemnify your end users for claims</p> <p>9 brought by third parties against your end</p> <p>10 users?</p> <p>11 A. I don't believe so.</p> <p>12 Q. Would it be fair to say that you're asking</p> <p>13 BellSouth to do something -- to indemnify</p> <p>14 you for causes of action and claims that</p> <p>15 you're not willing to do for your own end</p> <p>16 users?</p> <p>17 A. No. It would be fair to say that the</p> <p>18 version of -- the indemnification</p> <p>19 language proposed by BellSouth is so</p> <p>20 draconian in that it provides that NuVox</p> <p>21 basically acts as an insurance company for</p> <p>22 BellSouth in the event of BellSouth's</p> <p>23 negligence, that we've proposed some</p> <p>24 alternative language.</p> <p>25 Q. Do you know if this so-called draconian</p>	<p style="text-align: right;">Page 126</p> <p>1 terms and it is in a take it or leave it</p> <p>2 form, in my mind, that is a contract of</p> <p>3 adhesion.</p> <p>4 Q. Don't you have the right under the Act to</p> <p>5 negotiate issues that the parties dispute?</p> <p>6 A. We can argue about what your</p> <p>7 interpretation is or mine. I've told you</p> <p>8 what I think.</p> <p>9 Q. Well, I'm asking you, under your</p> <p>10 interpretation of 251 and 252, doesn't</p> <p>11 NuVox have a right to petition a</p> <p>12 commission to resolve disputes relating to</p> <p>13 issues involved in the negotiation of a</p> <p>14 252 agreement?</p> <p>15 A. Obviously we do. That's what we're doing</p> <p>16 now.</p> <p>17 Q. Did you participate in those prior</p> <p>18 negotiations with BellSouth?</p> <p>19 A. Yes.</p> <p>20 Q. Did you approve the prior language?</p> <p>21 A. I didn't approve the prior language.</p> <p>22 Q. You didn't ask to change it?</p> <p>23 A. We did ask to change it.</p> <p>24 Q. Why didn't you petition the commission if</p> <p>25 there was a dispute?</p>

4 (Pages 123 to 126)

<p style="text-align: right;">Page 127</p> <p>1 A. I've already been through this. At that 2 time, in the year 2000, arbitration was 3 not an option. 4 Q. Do I remember correctly that NuVox 5 actually filed for petition of arbitration 6 and on the eve of the first hearing you 7 withdraw it or entered a settlement? 8 A. That's correct. 9 Q. Do you know if this issue, 10 indemnification, was one of the issues 11 that was teed up in the arbitration 12 proceeding? 13 A. It may have been. I can't recall. 14 Q. Why is NuVox only willing to indemnify 15 BellSouth or the provider of services for 16 libel, slander, or invasion of privacy 17 arising from the content of the receiving 18 party's own communications and not in the 19 instances further described in your 20 provision? 21 A. In the instances further described, if 22 BellSouth's negligence in the provision of 23 the services or -- causes BellSouth to 24 breach or violate some applicable law, 25 BellSouth should be responsible for the</p>	<p style="text-align: right;">Page 129</p> <p>1 A -- would indemnify the party that paid for 2 the services. 3 Q. Do you consider NuVox to be a service 4 provider as it relates to your end users? 5 A. We provide services to customers. 6 Q. Do you consider NuVox to be a service 7 provider? 8 A. To certain customers, yes. 9 Q. Isn't the concept of indemnification 10 to -- relates to claims brought by third 11 parties to one or both parties of a 12 contract? 13 A. That's one of the reasons that you have 14 indemnification provisions, yes. 15 Q. What's another? 16 A. Another is simply what I said previously, 17 an allocation of risk issue taken into 18 account given other terms and conditions 19 of a contract. 20 Q. Well, I mean, if the parties have a 21 disagreement between themselves, would 22 indemnification rights ever be triggered? 23 A. Indemnification rights could be triggered 24 if the parties have a disagreement between 25 themselves about which party is</p>
<p style="text-align: right;">Page 128</p> <p>1 damages related thereto. 2 Q. What is your understanding of an 3 indemnification provision? What is the 4 purpose of it? 5 A. There are many purposes. Can you tell me 6 what you're looking for? 7 Q. Well, I'd like to know everything that you 8 know. 9 A. About? 10 Q. The purpose of an indemnification 11 provision. 12 A. It can be an agreement between the parties 13 that allocates risk and provides some 14 insulation to either or both of the 15 parties in the event of certain 16 circumstances. 17 Q. Like what? 18 A. In the event that a service provider fails 19 to provide the services for which they are 20 paid consideration and liability and the 21 party paying for the services, which has 22 lived up to its obligation under the 23 agreement is subject to some liability, 24 the service provider oftentimes -- 25 Q. Do you consider --</p>	<p style="text-align: right;">Page 130</p> <p>1 responsible for exposure to a third party. 2 Q. And in that instance, a third party is 3 involved; correct? 4 A. That's correct. 5 Q. So wouldn't you agree with me that 6 indemnification rights generally are 7 triggered when a third party sues one 8 party to a contract; is that correct? 9 A. Generally, yes. 10 Q. Can you think of any other instance where 11 indemnification rights would be triggered 12 when a third party is not involved? 13 A. Not right now, no. 14 Q. Would it be fair to say that this 15 provision is designed to address 16 situations where third parties sue or 17 claim damages against either BellSouth or 18 NuVox? 19 A. That's correct. 20 Q. And as it states in your provision, you're 21 only willing to indemnify BellSouth for 22 claims of libel, slander, or invasion of 23 privacy arising from the content of the 24 receiving party's own communications; is 25 that right?</p>

5 (Pages 127 to 130)

<p style="text-align: right;">Page 131</p> <p>1 A. Yes, and NuVox is unwilling to ensure that 2 BellSouth is completely insulated from 3 exposure related to its own negligence. 4 Q. So if it's 99 percent BellSouth's 5 negligence, 1 percent NuVox's negligence, 6 would NuVox be willing to indemnify 7 BellSouth in that instance? 8 A. Repeat that. 9 Q. If the allocation of fault was 99 percent 10 BellSouth, 1 percent NuVox, would NuVox 11 indemnify BellSouth in that instance? 12 A. Under this -- Under the indemnification 13 language proposed by BellSouth, the way I 14 interpret it is that in the event that 15 a -- that a lawsuit was brought against 16 BellSouth and NuVox, even if there was a 17 99 percent finding of fault against 18 BellSouth, BellSouth would have a claim 19 that because it provided the services 20 under this agreement, then NuVox would be 21 responsible for those damages. 22 Q. Wouldn't Bell -- And you changed my 23 question, because I was actually referring 24 to your language, but I'll go ahead with 25 BellSouth's language.</p>	<p style="text-align: right;">Page 133</p> <p>1 to expand the sentence reading -- or 2 starting the party receiving services 3 hereunder, its ability to its parent 4 company to also apply to the party 5 providing the services? 6 A. Well, I mean, that's our position as of 7 today. That's our most recent proposal, 8 that we were at loggerheads over this 9 issue. So that's our proposal as of 10 today. We have not received any 11 counterproposal from BellSouth that's 12 different from BellSouth's version. So 13 for purposes of this discussion, that's 14 our best offer. 15 Q. Would you agree with me that your language 16 is more expansive than BellSouth's 17 language regarding the types of claims 18 that are indemnifiable? 19 A. I mean, I think there's a distinction 20 without a real difference. 21 Q. Well, wouldn't you agree with me that 22 BellSouth's language limits 23 indemnification to any claim, loss, or 24 damage claimed by the end user of the 25 party receiving services?</p>
<p style="text-align: right;">Page 132</p> <p>1 Isn't BellSouth's language, at 2 least in subsection 2, limited to claims 3 by your end user? 4 A. The language states any claim, loss, or 5 damage claimed by the end user of the 6 party. So it could be an end user of the 7 party receiving services. So in -- if 8 BellSouth were providing the service and 9 NuVox were receiving the service, yes. 10 Q. And that's it? 11 A. That's it. 12 Q. Why is NuVox not willing to make a 13 proposal that would indemnify BellSouth or 14 the party providing services against any 15 claim, loss, or damage that arises from 16 the receiving party's failure to abide by 17 applicable law or injuries or damages 18 arising out of or in connection with this 19 agreement, to the extent caused by the 20 receiving party's negligence, gross 21 negligence, or willful misconduct? 22 A. I can't say that we've ever been presented 23 with a mutual indemnification provision 24 that we believe is equitable. 25 Q. But as it stands today, you're not willing</p>	<p style="text-align: right;">Page 134</p> <p>1 A. That's what the language says. 2 Q. And isn't the Joint Petitioners' language 3 more expansive in that it doesn't limit 4 indemnification rights to claims by the 5 end user; any claim, loss, or damage? 6 A. That's right. 7 Q. So under your proposal, there are more 8 instances where BellSouth would be 9 obligated -- or the party providing 10 service would be obligated to indemnify 11 NuVox than in BellSouth's proposal, which 12 is limited to instances where your end 13 user sues BellSouth, would that be a fair 14 statement? 15 A. There's that possibility, yes. 16 Q. Now, in your language, you are willing to 17 indemnify the party providing services for 18 libel, slander, invasion of privacy 19 arising from the content of the receiving 20 party's own communications; is that right? 21 A. That's right. 22 Q. What does that mean? 23 A. That means that in the event NuVox allowed 24 the use of its service so that plaintiff 25 alleged libel, slander, or invasion of</p>

6 (Pages 131 to 134)

<p style="text-align: right;">Page 135</p> <p>1 privacy, NuVox was at fault, NuVox would 2 indemnify BellSouth in those instances. 3 Q. How would that work? 4 A. Well, this was -- that language was taken 5 essentially verbatim out of BellSouth's 6 indemnification section, so -- 7 Q. What did you -- 8 A. -- we assumed that y'all had had 9 experience in that regard and felt like it 10 was -- if we allow end users cut -- end 11 user customers to use the services to 12 commit those -- that type of tortious 13 conduct that's described in section 1, 14 that we would indemnify BellSouth. I 15 personally don't have any experience with 16 those type of claims. We have not allowed 17 our customers to use the services in that 18 manner, but believe that BellSouth must 19 have some bona fide reason for including 20 that language. 21 Q. Your provision relating to libel, slander, 22 and invasion is not identical to 23 BellSouth's language; is that right? 24 A. It may not be identical. It's -- 25 Q. Do you know why it's different, why you've</p>	<p style="text-align: right;">Page 137</p> <p>1 MR. CAMPEN: Just for 2 clarification, you're referring, when you 3 refer to BellSouth's version, to page 11 4 of Exhibit 13, the second paragraph under 5 10.5; is that right? 6 MR. MEZA: Yes. Yes. 7 MR. CAMPEN: Or am I on the 8 wrong -- 9 MR. MEZA: Yes 10 MR. CAMPEN: Okay. And about five 11 lines from the bottom of that, the word 12 "content" is included. Am I reading that 13 correctly? BellSouth's version. Make 14 sure I've got the right document. 15 MR. MEZA: Yeah. 16 MR. CAMPEN: The word "content" -- 17 The only reason I ask is because the word 18 content is in both sections, my version 19 and the BellSouth version. 20 MR. MEZA: Okay. 21 Q. Now, under your language, you would have 22 the providing party indemnify you for any 23 claim, loss, or damage; is that correct? 24 A. Any claim, loss, or damage to the extent 25 arising from the providing party's failure</p>
<p style="text-align: right;">Page 136</p> <p>1 made the change? 2 (PAUSE.) 3 A. Tell me where you see a difference. 4 Q. Your language states, arising from the 5 content of the receiving party's own 6 communications. BellSouth's language 7 states, arising from the receiving party's 8 own communications. 9 A. Can you repeat that, please? 10 Q. Your language says, arising from the 11 content of the receiving party's own 12 communications. BellSouth's language 13 doesn't have from the content. Why was 14 that deleted or why was that added, the 15 phrase "from the content"? 16 A. I can't recall, given the number of 17 changes that we've made to our proposal. 18 I don't think there's any -- If there 19 were -- I can't speak for the group, but 20 if removing words "the content" from our 21 proposal makes it acceptable to BellSouth, 22 I'm sure that's something we'd consider. 23 Q. Do you have any idea why you've added 24 those words sitting here today? 25 A. I can't recall.</p>	<p style="text-align: right;">Page 138</p> <p>1 to abide by applicable law or injuries or 2 damages arising out of or in connection 3 with this agreement. 4 Q. What does failure to abide by applicable 5 law mean? 6 A. Providing matter violates applicable law 7 in some manner. It could mean a lot of 8 different things in that. It could mean 9 that BellSouth, without cause, terminates 10 provision of services to NuVox and NuVox 11 end users are damaged because they lose 12 telecommunication services due to an act 13 of BellSouth. BellSouth in that instance 14 would indemnify NuVox for the damages 15 caused to the NuVox customers. 16 Q. Only in the instance where your NuVox 17 customers sued NuVox; correct? 18 A. That's correct. 19 Q. So you're not suggesting that 20 indemnification rights apply directly to 21 NuVox when NuVox isn't sued by a third 22 party, are you? 23 A. I'm not suggesting that indemnification 24 rights apply when a party sues BellSouth 25 and NuVox is not a party.</p>

<p style="text-align: right;">Page 139</p> <p>1 Q Okay. So in this instance, the claims, 2 loss, or damages have to arise from a 3 third party suing NuVox and that those 4 claims, loss, or damages that NuVox 5 experiences results solely from 6 BellSouth's failure to abide by applicable 7 law? 8 A. That's correct. 9 Q. Or injuries or damages arising out of or 10 in connection with this agreement? 11 A. That's correct. 12 Q. So if no third party sues NuVox, then this 13 provision is not triggered; would you 14 agree with that? 15 A. That's right. 16 Q. Now, what claim, loss, or damage would you 17 experience if your liability pursuant to 18 your tariff or end-user contract is 19 limited to the cost of the services that 20 were not provided? 21 A. Well, I mean, that's taking a lot of 22 things into account. That's taking into 23 account that there's been no amendment to 24 a customer contract that provides for 25 additional exposure for NuVox. It's</p>	<p style="text-align: right;">Page 141</p> <p>1 amounts credited, NuVox would seek to 2 enforce its indemnification rights 3 If all the customer were able to 4 recover were the credits, no, the 5 indemnification rights would not be 6 triggered, other than possibly for, you 7 know, some additional recovery that I 8 can't imagine right now. 9 Q. Now, what law are you referring to when 10 you use the phrase "applicable law"? 11 A. It could be a federal telecom act. It 12 could be a state-specific telecom act 13 If a BellSouth technician were on 14 a truck run on behalf of NuVox and, as has 15 happened in the past, ran into a 16 customer's house, it would be basic 17 traffic laws. It's any law that applies 18 to this agreement. 19 Q. Let's say, for instance, that the FCC 20 rules that BellSouth doesn't have an 21 obligation to provide you with 22 high-capacity loops at TELRIC, okay. And 23 the agreement does not address whether or 24 not state unbundling rules apply to that 25 service. Would it be NuVox's position</p>
<p style="text-align: right;">Page 140</p> <p>1 taking into account that that tariff and 2 the liabilities of limitations contained 3 in the tariff are recognized and respected 4 by the Court and that it's upheld as a 5 shield so that there is only liability for 6 the outage time, if you will, and credits 7 provided to end users So it would only 8 be liability for the credits And if it 9 was -- if the liability for the credits 10 was related solely to BellSouth's 11 negligence, NuVox would seek a like credit 12 from BellSouth. 13 Q. And if BellSouth had already credited you 14 for the time its service was out, would 15 you still seek to invoke your 16 indemnification rights to receive the 17 credits a second time? 18 A. Can't double dip. 19 Q. So in that instance, the one that we 20 described, in all the exceptions and 21 conditions that you created, would NuVox 22 invoke its indemnification rights? 23 A. If the event that a customer sued NuVox 24 and BellSouth and the customer were to 25 recover some damages in addition to the</p>	<p style="text-align: right;">Page 142</p> <p>1 that the state laws that may exist and may 2 provide some type of recourse to NuVox 3 would be something that would be 4 considered applicable law? 5 A. If this agreement expressly excluded the 6 application of the state law that allowed 7 for the provision of UNEs or required 8 BellSouth to provide UNEs to NuVox at 9 TELRIC and that state law were expressly 10 excluded from this agreement and the FCC 11 got rid of any federal requirement, 12 neither of those -- let me restate that 13 -- that would not be considered an 14 applicable law. 15 Q. What if the agreement is silent on state 16 law? 17 A. If the agreement is silent with regard to 18 state law, that law is included in the 19 agreement because it is not expressly 20 excluded from the agreement. That's 21 basically Georgia black book law -- black 22 letter law, I'm sorry. 23 Q. So it's your interpretation that in a 24 Section 252 agreement, that unless the 25 agreement specifically states that state</p>

8 (Pages 139 to 142)

<p style="text-align: right;">Page 143</p> <p>1 law is expressly excluded as it relates to 2 the subject matter of the interconnection 3 agreement, it is incorporated into the 4 agreement? 5 A. It's my -- Georgia law governs these 6 agreements. Georgia law provides crystal 7 clear, unless you expressly exclude 8 statute law, federal order, et cetera from 9 an agreement between the parties, that it 10 is included in the contract as if it was 11 law at the time the contract was 12 executed. So, yes, if the parties intend 13 to exclude some law, order, rule, et 14 cetera from this agreement, then they have 15 to expressly exclude it in the terms of 16 the agreement 17 Q. So presume for me that at the time of the 18 execution of this contract we do not 19 resolve all of the issues that may result 20 from the FCC's final unbundling rules, 21 that those laws are in existence at the 22 time that you sign your agreement. Is it 23 your understanding that those final rules 24 would be applicable to the contract since 25 they were in existence on the date that</p>	<p style="text-align: right;">Page 145</p> <p>1 Q. But it's your opinion that if the law is 2 in existence at the time of execution, 3 that law is incorporated into the 4 agreement unless it is expressly excluded, 5 is that right? 6 A. We've agreed that Georgia law applies to 7 this -- this contract. Georgia law, as I 8 understand it, indicates that unless you 9 expressly exclude something from the 10 contract, that it becomes part of the 11 contract at the time of execution. 12 Q. Okay. Now, do your tariffs insulate you 13 from liability for any services provided 14 by a third party? 15 A. I believe that our tariff filings do 16 provide for that protection. 17 Q. If that is true, why would you need 18 indemnification rights? 19 A. First of all, there's no guarantee that a 20 court would allow those tariffs to act as 21 a shield. Second, there appears to be a 22 growing -- or a movement afoot to get rid 23 of the filed tariff doctrine. We are -- 24 don't necessarily agree that that's 25 appropriate, but we have to protect</p>
<p style="text-align: right;">Page 144</p> <p>1 you signed? 2 A. I'm confused. You said assume that there 3 were -- Did you say that -- Repeat that 4 for me. 5 Q. Okay. Assume for me that the FCC's final 6 rules come out and we sign a contract 7 because we're still doing dispute 8 resolution or for some reason we do not 9 get to the disputes relating to the final 10 rules, if there are any, prior to 11 execution, okay. Would it be your opinion 12 under your interpretation of applicable 13 law under Georgia law that those rules 14 would be incorporated into the 15 interconnection agreement? 16 A. Do you mean automatically incorporated? 17 Q. Yeah 18 A. If a -- If an -- If the FCC issued its 19 final rules that called for some change to 20 the federal act, the structure under which 21 this agreement operates, we would have a 22 change of law situation. We would, as has 23 been the case under our current agreement, 24 amended our agreement to incorporate new 25 law that comes out post-execution.</p>	<p style="text-align: right;">Page 146</p> <p>1 ourselves as we see fit. And one of the 2 ways that we believe we should protect 3 ourselves is to have equitable 4 indemnification provisions in this 5 interconnection agreement. 6 Q. Are you aware of any instance in which a 7 court of law has nullified your tariff 8 provisions relating to shielding you from 9 liability for acts of third parties or 10 from any service provider? 11 A. Not NuVox in general, no. 12 Q. Can you please describe this movement that 13 you're referring to? 14 A. I have been sent articles that discuss the 15 possibility of -- given growth and 16 competition, of making amendments to the 17 filed tariff doctrine. 18 Q. Are you aware of any instance where such a 19 movement is present in a BellSouth state? 20 A. I can't -- I don't know any specifics 21 regarding BellSouth's states. 22 Q. In the event that a customer sues you for 23 services -- relating to services that you 24 receive from BellSouth, would it be 25 NuVox's intentions to enforce the tariff</p>

<p style="text-align: right;">Page 147</p> <p>1 as it relates to that customer?</p> <p>2 A. That would be one of our contentions.</p> <p>3 Q. I'd like to focus your attention on the</p> <p>4 second paragraph of your language in 10.5.</p> <p>5 MR. CAMPEN: Excuse me, Mr. Meza.</p> <p>6 MR. MEZA: Sure.</p> <p>7 MR. CAMPEN: Do you mean the</p> <p>8 section preceded by the parenthetical two?</p> <p>9 MR. MEZA: Yes, to the Joint</p> <p>10 Petitioners' language agreement.</p> <p>11 MR. CAMPEN: Yeah.</p> <p>12 Q. What does arising out of or in connection</p> <p>13 with this agreement mean?</p> <p>14 A. Arising out of or in connection with the</p> <p>15 services provided pursuant to this</p> <p>16 agreement.</p> <p>17 Q. Why didn't you use directly caused or</p> <p>18 proximately caused?</p> <p>19 A. During the process working with the Joint</p> <p>20 Petitioners, this is the language that we</p> <p>21 agreed to. I can't recall any specifics</p> <p>22 regarding why we chose this language over</p> <p>23 any other</p> <p>24 Q. Would you agree to further restrict your</p> <p>25 language to directly or proximately</p>	<p style="text-align: right;">Page 149</p> <p>1 try to enforce its indemnification rights</p> <p>2 where it was receiving any, quote,</p> <p>3 unquote, damages. It would be to make</p> <p>4 NewSouth whole for damages that it was</p> <p>5 subject to through some lawsuit</p> <p>6 Q. So if an end user sues NuVox and is</p> <p>7 successful in that lawsuit and the</p> <p>8 conditions set forth in your language</p> <p>9 apply, it's your -- and the cause of</p> <p>10 action was a result of negligence, it's</p> <p>11 your opinion that the limitation of</p> <p>12 liability language should not apply</p> <p>13 regarding how much BellSouth would have to</p> <p>14 indemnify NuVox?</p> <p>15 A. I don't know if I agree that that was</p> <p>16 intended. I think we've discussed the</p> <p>17 limitation of liability language at</p> <p>18 length. It is our position that the</p> <p>19 liability of limitation language that</p> <p>20 provides for 7-1/2 percent of the</p> <p>21 aggregate fees paid up until the time of</p> <p>22 the date of the cause of action arises, if</p> <p>23 you will, would be the limit.</p> <p>24 Q. Even for indemnification?</p> <p>25 A. I believe so.</p>
<p style="text-align: right;">Page 148</p> <p>1 caused?</p> <p>2 A. If we're provided with a meaningful</p> <p>3 proposal that provides for a more</p> <p>4 equitable indemnification provision,</p> <p>5 that's something that the Joint</p> <p>6 Petitioners will definitely consider.</p> <p>7 Q. Why did you include negligence?</p> <p>8 A. That's a theory under which there might be</p> <p>9 liability exposure, and we included it,</p> <p>10 again, after discussion among the Joint</p> <p>11 Petitioners. Why specifically it was</p> <p>12 included as opposed to being excluded, I</p> <p>13 can't recall.</p> <p>14 Q. Would you agree that the limitation of</p> <p>15 liability language that either party has</p> <p>16 proposed applies to claims of negligence?</p> <p>17 A. I believe so, yes.</p> <p>18 Q. With this indemnification provision and by</p> <p>19 including negligence as a cause to have</p> <p>20 BellSouth indemnify you, could there be a</p> <p>21 situation where NuVox could obtain damages</p> <p>22 in excess of even its limitation of</p> <p>23 liability cap under this provision?</p> <p>24 A. I mean, it's in the realm of possibility.</p> <p>25 I don't see an instance where NuVox would</p>	<p style="text-align: right;">Page 150</p> <p>1 Q. Would you agree with me that, based on the</p> <p>2 language as written today, it could be</p> <p>3 argued that this provision guts the</p> <p>4 limitation of liability?</p> <p>5 A. I would agree that it could be argued</p> <p>6 today that the negligence cause of action</p> <p>7 might trigger the indemnification</p> <p>8 provision. I don't know it necessarily</p> <p>9 guts limitations of liability.</p> <p>10 Q. Would you agree with me that, under the</p> <p>11 language as it appears today, that</p> <p>12 BellSouth could be liable for more damages</p> <p>13 in excess of the limitation of liability</p> <p>14 cap for a negligence action?</p> <p>15 A. If directly or proximately caused by</p> <p>16 BellSouth's action, that's a possibility.</p> <p>17 Q. Is that your intention?</p> <p>18 A. When you say "your intention", do you mean</p> <p>19 the Joint Petitioners?</p> <p>20 Q. NuVox. If you can speak on behalf of</p> <p>21 Joint Petitioners --</p> <p>22 A. NuVox isn't interested in a business that</p> <p>23 is supported by or focused on litigation.</p> <p>24 With this language, our intention is to</p> <p>25 provide for meaningful protection for</p>

<p style="text-align: right;">Page 151</p> <p>1 NuVox. 2 Q Is it your intention that the 7-1/2 3 percent cap that you recommend for 4 limitation of liability applies to this 5 indemnification provision as well? 6 A. The 7-1/2 percent cap is our proposal for 7 a limitation of liability for both 8 parties, so, yes. 9 Q. And just to make sure there's no further 10 disagreement on this issue, it would be 11 for negligent actions? 12 A. Well -- 13 Q. Because -- 14 A The limitation of liability? 15 Q. Yes. 16 A. It should be, yes. 17 Q Yeah And so for limitations -- for 18 negligent actions, it's your intent that 19 the 7-1/2 percent would apply to whatever 20 indemnification claims you may have 21 against BellSouth? 22 A. That's what the limitation of liability 23 language says, so, yes. 24 Q. Do you know if any of your end users have 25 ever sued BellSouth?</p>	<p style="text-align: right;">Page 153</p> <p>1 A. I believe so. 2 Q. Do you know the nature of the complaint? 3 A. In the instance that I'm thinking of, it 4 was related to service outages. 5 Q. They've actually filed a lawsuit? 6 A. It was filed. It's been handled. 7 Q. Do you have any more specifics relating to 8 the service outage, how long they were 9 out? 10 A. I'd have to review the complaint. It was 11 some time ago. 12 Q. How long ago was this complaint filed? 13 A. Two years, three years. 14 Q. And what defenses did NuVox assert? 15 A. Defenses -- Any defenses associated with 16 that end-user's contract. 17 Q. Do you know if that end-user's contract 18 had the tariff limitation of liability? 19 A. I believe it did, yeah. 20 Q. And that case settled? 21 A. It did settle, yes. 22 Q. Is that settlement confidential? 23 A. I believe so. 24 Q. Do you know if -- I don't want amounts 25 Do you know if NuVox settled for more than</p>
<p style="text-align: right;">Page 152</p> <p>1 A. I believe so. 2 Q. Do you know in what context? 3 A Service-related issues, I guess -- I 4 mean, I guess. 5 Q I don't want you to guess 6 A. Sorry I haven't -- The complaints that 7 I've seen were related to services that 8 BellSouth provided to NuVox under its 9 current interconnection agreement. 10 Q Are these complaints at a commission or in 11 a court of law? 12 A. They have been both at a commission and 13 at -- and in court. When I speak 14 commission, I'm not necessarily talking 15 about formal complaints. I'm talking 16 about consumer complaint issues to a 17 Consumer Affairs Department. 18 Q. Okay. Are you aware of any instance where 19 a NuVox consumer has sued BellSouth in a 20 court of law? 21 A. I can't recall 22 Q. Has NuVox ever been sued by an end -- by 23 one of its end users in a court of law? 24 A. By one of its customers? 25 Q. Yes.</p>	<p style="text-align: right;">Page 154</p> <p>1 the credits? 2 A. It did settle for more than the credits, 3 yes. 4 Q. Do you know how much more? 5 A. I can't recall. 6 Q. Did the end user sue BellSouth? 7 A. I don't believe so. 8 Q. Did NuVox third party BellSouth? 9 A. We had prepared a third-party cross-claim 10 Q. Well, what do you mean "cross-claim"? 11 A. However -- however -- The issue settled 12 prior to. 13 Q. So the answer would be, no, you did not 14 file a third party -- 15 A. The issue settled, frankly, because the 16 firm that represented the plaintiff also 17 represented BellSouth and didn't want to 18 get BellSouth into trouble. He was in a 19 pickle, let's put it that way. 20 Q. Do you know what state this -- 21 A. South Carolina. 22 Q. South Carolina. Okay. 23 Do you agree state commissions 24 have authority to enforce and interpret 25 interconnection agreements that they</p>

<p style="text-align: right;">Page 155</p> <p>1 approve?</p> <p>2 A Certain states. Some under the current</p> <p>3 state of the law probably do not.</p> <p>4 Q Which ones?</p> <p>5 A. South Carolina.</p> <p>6 Q. You don't think South Carolina?</p> <p>7 A South Carolina has no right to regulate</p> <p>8 anything related to a bundled service</p> <p>9 offering since Governor Sanford signed</p> <p>10 into law a bill related to last year --</p> <p>11 that came out of last year's session.</p> <p>12 Q. Is it your opinion that South Carolina --</p> <p>13 the South Carolina Commission does not</p> <p>14 have the authority to arbitrate under the</p> <p>15 Act?</p> <p>16 A. As it relates to bundled service</p> <p>17 offerings, no</p> <p>18 Q. Is there any bundled service offering at</p> <p>19 issue in this interconnection agreement?</p> <p>20 A Bundled service offerings by their very</p> <p>21 nature incorporate services purchased by</p> <p>22 NuVox from BellSouth pursuant to an</p> <p>23 interconnection agreement.</p> <p>24 Q Why is that?</p> <p>25 A Without unbundled -- Without UNEs, loops,</p>	<p style="text-align: right;">Page 157</p> <p>1 Carolina Commission has the authority?</p> <p>2 A. At this time, yes.</p> <p>3 Q. Why is that?</p> <p>4 A. They've accepted authority. We've got</p> <p>5 this arbitration filed.</p> <p>6 Q. So simply because the South Carolina</p> <p>7 Commission has accepted the petition, you</p> <p>8 believe that they now have the authority</p> <p>9 to arbitrate it under the Act?</p> <p>10 A. We filed our arbitration petition, I</p> <p>11 believe, prior to Governor Sanford signing</p> <p>12 the law, that legislation. They accepted</p> <p>13 the arbitration petition. They have</p> <p>14 authority to arbitrate this -- the</p> <p>15 disputes between the parties related to</p> <p>16 this interconnection agreement</p> <p>17 Q. Do you know if the Joint Petitioners</p> <p>18 withdrew that petition pursuant to the</p> <p>19 90-day abatement period?</p> <p>20 A I don't know.</p> <p>21 Q. If they did and there currently is no</p> <p>22 arbitration pending in South Carolina,</p> <p>23 would that change your opinion?</p> <p>24 A. No.</p> <p>25 Q. Why not?</p>
<p style="text-align: right;">Page 156</p> <p>1 NuVox can't provide services to its</p> <p>2 customers. We purchase those loops</p> <p>3 pursuant -- through our current</p> <p>4 interconnection agreement and quite</p> <p>5 possibly pursuant to this interconnection</p> <p>6 agreement, if it ever comes into being.</p> <p>7 Q. So it's your opinion that in South</p> <p>8 Carolina, the South Carolina Commission</p> <p>9 does not have the authority to conduct a</p> <p>10 252 arbitration?</p> <p>11 A. It's my opinion that there is legislation</p> <p>12 now on the books in South Carolina that</p> <p>13 prohibits the Commission from regulating</p> <p>14 bundled service offerings.</p> <p>15 Q. Now, you didn't answer my question. Is it</p> <p>16 your opinion that he South Carolina</p> <p>17 Commission, as a result of this</p> <p>18 litigation, cannot conduct a 252</p> <p>19 arbitration proceeding?</p> <p>20 A. No, the Commission can conduct a 252</p> <p>21 arbitration proceeding that does not</p> <p>22 necessarily, by its nature, put at issue</p> <p>23 the provision of services pursuant to a</p> <p>24 bundled service offering.</p> <p>25 Q And in our case, do you think the South</p>	<p style="text-align: right;">Page 158</p> <p>1 A. Because this -- the arbitration of this</p> <p>2 interconnection agreement does not put at</p> <p>3 issue services provided to an -- through</p> <p>4 a bundled service offering</p> <p>5 Q. It sounds like you're changing your</p> <p>6 answer.</p> <p>7 A. No.</p> <p>8 Q. I first asked you if bundled components or</p> <p>9 whatever you want to call them, bundles</p> <p>10 were at issue in this arbitration, and you</p> <p>11 said, yes, everything that NuVox buys is a</p> <p>12 bundled component.</p> <p>13 A. Component, no. Maybe I did not explain</p> <p>14 myself clearly. Elements that NuVox uses</p> <p>15 in provisioning services to its customers</p> <p>16 as part of a bundled service offering are</p> <p>17 purchased pursuant to this agreement</p> <p>18 Q But you don't buy bundles from BellSouth?</p> <p>19 A. No.</p> <p>20 Q. So is it really at issue, this South</p> <p>21 Carolina legislation?</p> <p>22 A. Your original question was, does South</p> <p>23 Carolina have jurisdiction to resolve</p> <p>24 issues related to interconnection</p> <p>25 agreement disputes.</p>

12 (Pages 155 to 158)

<p>Page 159</p> <p>1 Q. That wasn't my question, but I'll ask my 2 question -- my original question again. 3 Do you agree that state 4 commissions have authority to enforce and 5 interpret interconnection agreements that 6 they approve pursuant to the Act? 7 A Some states do. I think it is 8 questionable whether certain others do at 9 this time. 10 Q. What other state other than South 11 Carolina? 12 A. No other state. 13 Q. So what other state were you referring to 14 when you said -- 15 A. I was referring solely to South Carolina. 16 Q. So instead of using states plural, it 17 should be state? 18 A. It should be state. 19 Q. And your belief that South Carolina lacks 20 authority to enforce and interpret an 21 interconnection agreement under the Act is 22 because of state law regarding the 23 inability to regulate a bundled service? 24 A In a dispute related to an interconnection 25 agreement that by its nature brings into</p>	<p>Page 161</p> <p>1 agreement with a CLEC. I don't know. 2 Q. And do you know what the Supreme Court 3 ruled in that issue regarding standing? 4 A. I'm not sure what the Supreme Court ruled. 5 Q. Is it your experience that end users use a 6 state commission to enforce or interpret 7 the obligations of NuVox and BellSouth 8 relating to their interconnection 9 agreement? 10 A. It's my experience that consumers use 11 public service commissions to resolve 12 service-related issues that they've 13 experienced with carriers who provide them 14 service. 15 Q. Do you know if the South Carolina law that 16 you are referencing applies to wholesale 17 services? 18 A. I believe it provides to any services 19 related to a bundled service offering, 20 which may include wholesale services. 21 Q. Is it your testimony that, absent South 22 Carolina state law, that the South 23 Carolina Commission would have the 24 authority to interpret and enforce 25 interconnection agreements that they</p>
<p>Page 160</p> <p>1 play issues related to bundled service 2 offerings, the Commission would not have 3 authority to -- to -- would not have 4 jurisdiction to determine such a 5 complaint. 6 Q. Give me an example of a situation where 7 the Commission would not have authority. 8 A. Okay Let's say that a NuVox customer 9 filed a lawsuit -- or filed a complaint 10 with the Commission against NuVox and 11 BellSouth related to services that it 12 purchased from NuVox as part of a bundled 13 service offering. The complaint alleged 14 that BellSouth was at fault because it 15 failed to provide adequate services as 16 required pursuant to this interconnection 17 agreement. 18 Q. Why in the world would a NuVox customer 19 sue BellSouth for not complying with the 20 interconnection agreement to which it's 21 not a party? 22 A. Why did -- I can't recall the consumer 23 who sued Verizon in an antitrust case. It 24 sued Verizon for its failure to live up to 25 its obligations in an interconnection</p>	<p>Page 162</p> <p>1 approved pursuant to the Act? 2 A. Yes. 3 Q. Is it your opinion that the South Carolina 4 Commission cannot approve a 252 agreement? 5 A. No They can approve a 252 agreement. 6 Q. And how does that differ from approving or 7 -- versus enforcing? 8 A. If the enforcement were related to, as I 9 see it, in any way a bundled service 10 offering, that legislation clearly 11 prohibits a South Carolina Public Service 12 Commission from doing anything. 13 Q. Would you consider UNE-P to be a bundled 14 service offering? 15 A. If coupled with a data product or any 16 other product, if coupled with Call 17 Waiting, if coupled with Caller ID, local 18 service with any other product is a 19 bundled service offering pursuant to that 20 legislation. 21 Q. All of those items that you referred to, 22 Call Waiting, that's not something that 23 you purchase under the interconnection 24 agreement, is it? 25 A. Our rights to resell services are the</p>

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<p>1 subject of this agreement, so I'm not so 2 sure how that plays. I think that in -- 3 with the -- without a resale agreement or 4 an interconnection agreement -- pure 5 resell agreement or an interconnection 6 agreement that incorporates resell, we 7 would have no right to purchase those 8 services. 9 Q Let's say that BellSouth and NuVox have a 10 dispute over a provision in the contract. 11 A. All right. 12 Q. Does the South Carolina Commission have 13 authority to resolve that dispute? 14 A It depends what that dispute is related 15 to 16 Q If it's related to the pricing associated 17 with the conversion of special access 18 circuits to use 19 A My first impression would be the South 20 Carolina Public Service Commission would 21 have jurisdiction over that type of 22 dispute. However, if through some 23 expansion reading of that legislation, 24 because those EELs were used to provide 25 bundled service offerings to end-user</p>	<p>1 Q. And would you agree with me that you could 2 get different rulings for each of the 3 remaining issues that the parties are 4 arbitrating -- 5 A. That -- 6 Q. -- as a result of that? 7 A. We could, yes. 8 Q. Do you believe that state commissions have 9 expertise to address issues relating to 10 the interpretation or implementation of 11 the interconnection agreement? 12 A. They have expertise in certain issues; and 13 other issues related to this 14 interconnection agreement, the parties 15 might be better served in a different 16 forum. 17 Q. Which types of disputes do you think are 18 more appropriate in places other than the 19 state commission? 20 A. We've already agreed that intellectual 21 property disputes would be more 22 appropriately brought before a court of 23 law. 24 Q. What else? 25 A. Could be antitrust issues. There could be</p>
Page 164	Page 166
<p>1 customers of NuVox, you could make an 2 argument that they don't. 3 Q Are you aware of any federal court 4 decision that has held that state 5 commissions have the authority to 6 interpret and enforce agreements pursuant 7 to federal law? 8 A I'm not aware of any. 9 Q. If there was a case, would that change 10 your opinion of whether South Carolina -- 11 A It could. I'd have to review that case. 12 I'm not sure. 13 Q. Would you agree that litigation or dispute 14 resolution is expensive and uncertain, 15 regardless of the forum? 16 A. It can be. 17 Q. Do you agree that the Act requires 18 BellSouth and NuVox to obtain the approval 19 of nine different states for this 20 agreement? 21 A I believe it does. 22 Q. And would you agree with me that the 23 parties are arbitrating in each of those 24 states? 25 A. Yes, we are.</p>	<p>1 many different types of disputes. 2 Q. Do you have any understanding of what they 3 are other than the ones you've just 4 identified? 5 A. We could have audit disputes that would be 6 better served in a court of law. 7 Q. What else? 8 A. Could be billing disputes, could be 9 service issues. 10 Q. Is there anything that is remaining? 11 A There's no -- There's no dispute that -- 12 we might agree it's better to have a 13 single court decide the issue to apply to 14 a nine-state agreement as opposed to 15 litigating the exact same issue before 16 nine different states. 17 Q. Look on page 40 of your direct testimony, 18 which should be Exhibit 1. 19 THE WITNESS: Off the record. 20 (DISCUSSION OFF THE RECORD.) 21 Q. Line 22, 23, following to page 41, line 1. 22 A Yeah. 23 Q. All right. Do you agree with me that here 24 you state or agree to the statement that 25 the FCC and the commission are obviously</p>

<p style="text-align: right;">Page 167</p> <p>1 the expert agencies with respect to a 2 number of issues? 3 A. Oh, sure. 4 Q. Do you know which issues you're referring 5 to here? 6 A. States -- The state commissions deal more 7 often with disputes related to pricing of 8 UNEs, to performance measures, to -- for 9 instance, win back issues. I mean, 10 there -- there's a number of things 11 obviously that the commissions have much 12 more expertise than the courts in 13 resolving 14 Q. What type of lawsuit or claim would you 15 want to bring to a court of law versus a 16 commission for resolution? 17 A. In the event that BellSouth violates the 18 terms of this agreement and the cause of 19 action center around -- let's see -- 20 antitrust issues for the parties -- NuVox 21 were to need to get any sort of injunctive 22 relief, for instance, if BellSouth were to 23 pull the plug on NuVox's service to its 24 customers, that -- those would be things 25 that we feel we should be able to take to</p>	<p style="text-align: right;">Page 169</p> <p>1 A. I'm familiar with the fact that they don't 2 go anywhere. 3 Q. Have you ever experienced one? 4 A. I believe that on the NewSouth side, we 5 tried an enforcement proceeding in the 6 past, and it's proven to be disappointing 7 circumstances in that regard. 8 Q. Are you aware of any requirement that 9 requires the FCC to make a ruling in an 10 enforcement proceeding within a date 11 certain? 12 A. I'm not familiar with that, but maybe 13 there is such a rule. 14 Q. You agree with me that various state 15 commissions can rule differently on where 16 the parties should be able to bring a 17 claim; correct? 18 A. I agree. 19 Q. Now, in that instance, for instance, let's 20 say that in two states you can bring a 21 claim to court first and the rest of the 22 states -- six states you have to go to the 23 commission or the FCC. Would it be 24 NuVox's position that in those two states 25 where you could bring a case to a court of</p>
<p style="text-align: right;">Page 168</p> <p>1 a court 2 Q. Do you know if certainly states have 3 injunctive relief? 4 A. I'm sure that certain state commissions do 5 have the authority to provide injunctive 6 relief where needed. 7 Q. Do you agree with me that you could bring 8 all disputes relating to a nine-state 9 agreement to the FCC for resolution? 10 A. We attempted to take a nine-state dispute 11 to the FCC for resolution, specifically 12 the EEL law dispute we had with 13 BellSouth. It's my understanding that 14 BellSouth argued to the FCC that the FCC 15 does not have -- I could be wrong about 16 this -- did not have authority to resolve 17 that dispute, and, in fact, the FCC has 18 not resolved that dispute. 19 Q. Is it still pending? 20 A. I'm not sure where we are procedurally at 21 the FCC, but I believe that our complaint 22 is still before the FCC. I'm not 23 positive 24 Q. Are you familiar with a procedure at the 25 FCC called an enforcement proceeding?</p>	<p style="text-align: right;">Page 170</p> <p>1 law that that decision would be binding on 2 the other six states? 3 A. In your -- It's hard for me to give you 4 an answer to that hypothetical without -- 5 I mean, if a Georgia court ruled on 6 Georgia law, it is my interpretation -- 7 it's my belief that that decision would be 8 exportable. If a Louisiana court ruled on 9 Georgia law, I would believe that a 10 Georgia court could take issue with that 11 decision. 12 Q. Do you believe that the very fact that 13 there could be different rulings relating 14 to this issue defeats or minimizes the 15 ability to do what I'll call a one-stop 16 shopping? 17 MR. CAMPEN: Objection to the form 18 of the question. 19 A. I can't speak on behalf of the Joint 20 Petitioners without having authority to do 21 so. I know that the Joint Petitioners 22 would be -- would find a one-stop shop 23 included in this agreement to be 24 attractive. I agree with you that, 25 without a one-stop shop, there is the</p>

<p style="text-align: right;">Page 179</p> <p>1 should be available to CLECs.</p> <p>2 Q. Regardless of whether that customer is a</p> <p>3 CLEC's customer?</p> <p>4 A. That's correct.</p> <p>5 Q. Why do you need to view the loop makeup</p> <p>6 information of a customer that's not your</p> <p>7 customer?</p> <p>8 A. To determine if it would be technically</p> <p>9 feasible to possibly provide service to</p> <p>10 that customer at some point in time.</p> <p>11 Q. Do you think other CLECs consider what you</p> <p>12 want to do with their loop makeup</p> <p>13 information to be proprietary to them?</p> <p>14 A. The loop is not owned by a CLEC. It's</p> <p>15 leased by a CLEC. The loop information is</p> <p>16 in BellSouth's OSS system, so I don't see</p> <p>17 how that could be proprietary. I don't</p> <p>18 care what a CLEC may or may not think</p> <p>19 about it.</p> <p>20 Q. Have you had any discussions with other</p> <p>21 CLECs regarding whether they would object</p> <p>22 to NuVox viewing a loop that they're</p> <p>23 leasing from BellSouth?</p> <p>24 A. I've had -- I've had discussions with the</p> <p>25 Joint Petitioners.</p>	<p style="text-align: right;">Page 181</p> <p>1 A. Yes.</p> <p>2 Q. What is the CCP?</p> <p>3 A. Change control process.</p> <p>4 Q. Did you participate in the -- or did</p> <p>5 NuVox participate in the CCP when LOAs for</p> <p>6 LMU was discussed in relation to shared</p> <p>7 loops?</p> <p>8 A. I'm not certain whether we participated in</p> <p>9 that particular issue discussion</p> <p>10 However, the use of LMU that we</p> <p>11 are talking about -- that I'm talking</p> <p>12 about in my testimony is different from</p> <p>13 the review of loop makeup information in</p> <p>14 the context of a shared loop scenario.</p> <p>15 Q. Have you ever raised this issue in the</p> <p>16 CCP?</p> <p>17 A. I'm not aware that we have raised this</p> <p>18 issue in the CCP because it doesn't have</p> <p>19 anything to do with the shared loop issue</p> <p>20 that was before the CCP</p> <p>21 Q. Would you be willing to address this issue</p> <p>22 in the CCP to allow other CLECs to weigh</p> <p>23 in?</p> <p>24 A. I don't know if it's an appropriate issue</p> <p>25 for the CCP process.</p>
<p style="text-align: right;">Page 180</p> <p>1 Q. Other than the Joint Petitioners?</p> <p>2 A. I can't recall any particular</p> <p>3 conversation</p> <p>4 Q. How often do you seek to review LMU</p> <p>5 information of another carrier today?</p> <p>6 A. I don't know -- have any particular</p> <p>7 numbers or percentages on that. I know</p> <p>8 that what we desire is the ability to take</p> <p>9 -- to review loop makeup information as</p> <p>10 we are entitled to do so pursuant to the</p> <p>11 Act. There's no requirement that you have</p> <p>12 an LOA to review loop makeup information.</p> <p>13 Q. Well, today, are you aware of any instance</p> <p>14 where NuVox has sought the LMU information</p> <p>15 for a loop that another CLEC is using to</p> <p>16 serve their customer?</p> <p>17 A. I'm not aware of any specific instances.</p> <p>18 My -- I'm not aware of any specific</p> <p>19 instances.</p> <p>20 Q. Has NuVox ever received a request by a</p> <p>21 CLEC to execute an LOA so that this other</p> <p>22 CLEC could view NewVox's LMU information?</p> <p>23 A. I'm not aware of any instances as I sit</p> <p>24 here today.</p> <p>25 Q. Does NuVox participate in the CCP?</p>	<p style="text-align: right;">Page 182</p> <p>1 Q. Do you have any objection to raising this</p> <p>2 in the CCP, other than whether you believe</p> <p>3 it's appropriate or not?</p> <p>4 A. The only objection that I have to raising</p> <p>5 this in the CCP is an outcome whereby</p> <p>6 BellSouth uses the fact that it is an</p> <p>7 issue before the CCP to deny CLECs access</p> <p>8 to LMU information for no other reason.</p> <p>9 So I don't theoretically have an issue</p> <p>10 with raising this at the CCP, except for</p> <p>11 my suspicion that once it is before the</p> <p>12 CCP, BellSouth will claim that, because it</p> <p>13 is before the CCP, CLECs cannot review LMU</p> <p>14 information until a decision comes out of</p> <p>15 CCP, and, during that time, impact efforts</p> <p>16 by CLECs to market their services by</p> <p>17 reviewing LMU information to determine if</p> <p>18 it's technically feasible to provide</p> <p>19 certain services over a particular loop.</p> <p>20 Q. And we're only talking about LMU</p> <p>21 information of another CLEC, is that</p> <p>22 right?</p> <p>23 A. That's right. As far as I know, yes.</p> <p>24 Q. Because you view the LMU information on a</p> <p>25 BellSouth loop, when it's a BellSouth</p>

<p>Page 183</p> <p>1 customer?</p> <p>2 A And we're entitled to do that.</p> <p>3 Q. To date, you can't identify a specific</p> <p>4 instance in which you have attempted to</p> <p>5 view the LMU information of another CLEC,</p> <p>6 have you?</p> <p>7 A. I don't know of any specific example.</p> <p>8 However, because our testimony requests</p> <p>9 clarification of our rights -- or requests</p> <p>10 that BellSouth acknowledge that we're</p> <p>11 entitled to review LMU information,</p> <p>12 whether it is for the BellSouth customer</p> <p>13 or another CLEC customer, with the</p> <p>14 exception of a shared loop scenario, and</p> <p>15 because this is an issue, leads me to</p> <p>16 believe that on occasion, NuVox in</p> <p>17 particular, may have attempted to review</p> <p>18 the LMU information of another CLEC. I'm</p> <p>19 not -- I'm not aware of any specific</p> <p>20 example.</p> <p>21 Q So you're speculating?</p> <p>22 A. I'm speculating.</p> <p>23 Q. Okay Turn to page 67 of your rebuttal</p> <p>24 testimony.</p> <p>25 A. That is?</p>	<p>Page 185</p> <p>1 Tricky.</p> <p>2 Q Do you really think BellSouth is --</p> <p>3 A. Fun loving.</p> <p>4 Q Well, I'm sure BellSouth would appreciate</p> <p>5 you thinking that it's fun loving. But do</p> <p>6 you really believe that BellSouth is being</p> <p>7 mischievous with this LOA requirement?</p> <p>8 A. Maybe that's not an appropriate</p> <p>9 descriptive term, but it appears to be --</p> <p>10 in my opinion, it is an unnecessary</p> <p>11 obstacle to CLECs reviewing that</p> <p>12 information. Is that a fairer description</p> <p>13 in your mind?</p> <p>14 Q. I don't -- I mean, I think it's perfectly</p> <p>15 acceptable, but I don't think whatever the</p> <p>16 issue is, it's mischievous.</p> <p>17 Do you really believe that</p> <p>18 BellSouth cares whether a CLEC views</p> <p>19 another CLEC's LMU information?</p> <p>20 A. I don't think BellSouth cares.</p> <p>21 Q. So why would -- why would our -- why</p> <p>22 would we have a mischievous attempt to do</p> <p>23 anything?</p> <p>24 A. If I could get behind the curtain and see</p> <p>25 the inner workings of BellSouth, I'd be a</p>
<p>Page 184</p> <p>1 Q. Exhibit 2. It should be right here.</p> <p>2 A. Oh. Thank you.</p> <p>3 Q. Sure.</p> <p>4 A. Okay.</p> <p>5 Q. Lines 5 through 7.</p> <p>6 A. Okay</p> <p>7 Q. The third-party loop information fiction</p> <p>8 is used by BellSouth to aid its</p> <p>9 mischievous attempt to impose upon Joint</p> <p>10 Petitioners and other CLPs an LOA</p> <p>11 requirement outside the shared use</p> <p>12 context. Do you see that?</p> <p>13 A. Yes.</p> <p>14 Q. Did you write that sentence?</p> <p>15 A. That's my testimony.</p> <p>16 Q. Do you agree with it?</p> <p>17 A. I agree with it in the sense that it</p> <p>18 appears BellSouth's requirement that a</p> <p>19 CLEC provide an LOA -- or obtain an LOA</p> <p>20 from another CLEC prior to viewing certain</p> <p>21 LMU information seems to be an obstacle in</p> <p>22 the way of CLECs winning customers.</p> <p>23 Q What is your understanding of the phrase</p> <p>24 or term mischievous?</p> <p>25 A. My son epitomizes the term mischievous.</p>	<p>Page 186</p> <p>1 rich man.</p> <p>2 Q. Do you think that's a false or a -- that</p> <p>3 description is not very accurate?</p> <p>4 A. No, I think it's -- I don't think that it</p> <p>5 is either not accurate or very accurate.</p> <p>6 It may be misplaced.</p> <p>7 Q. Has NuVox ever attempted to adopt an</p> <p>8 interconnection agreement in Florida,</p> <p>9 Georgia, Kentucky, or Louisiana that</p> <p>10 provides for the provision of FastAccess</p> <p>11 service on UNE facilities?</p> <p>12 A. I don't -- I don't think so. At one</p> <p>13 time, as you know, there were pick and</p> <p>14 choose rules. I don't believe that we</p> <p>15 sought to incorporate specific terms from</p> <p>16 the interconnection agreements in those</p> <p>17 states respectfully that allow that And</p> <p>18 now it's all or nothing, so here we are</p> <p>19 arbitrating an agreement. So, no, I don't</p> <p>20 believe we have tried to do that.</p> <p>21 Q. If BellSouth were required to provide its</p> <p>22 FastAccess retail service -- and do you</p> <p>23 know what I mean by that?</p> <p>24 A. Yes, yes, DSL -- BellSouth's DSL service.</p> <p>25 Q. Well, its retail service.</p>

19 (Pages 183 to 186)

<p style="text-align: right;">Page 187</p> <p>1 A. Right, right. 2 Q. If BellSouth is required to do that on the 3 same facility, would NuVox charge 4 BellSouth a rate for use of the high 5 spectrum portion of that loop? 6 A. NuVox's business plan does not at this 7 time include any real effort to provide 8 other than both data and voice services to 9 its customers. In the event that NuVox 10 decided to market services and would 11 accept -- or agree to provide service -- 12 voice service to a customer of BellSouth, 13 FastAccess, I'm sure that our 14 consideration of that type of business 15 plan would include whether or not to 16 charge BellSouth for the high-frequency 17 portion of that loop. 18 My feeling is that since we would 19 be -- "we" being NuVox -- would be 20 purchasing that loop most likely at 21 wholesale or TELRIC rate from BellSouth, 22 that we would seek to offset some of our 23 costs of the loop by charging BellSouth 24 some percentage -- charging back to 25 BellSouth some pro rata percentage of that</p>	<p style="text-align: right;">Page 189</p> <p>1 offer a DSL product, do they? 2 A. Currently, NuVox does offer -- does have 3 customers that purchase DSL services from 4 NuVox. We do not have a plan to offer 5 solely voice services to customers that 6 also receive BellSouth FastAccess service 7 Q. What DSL product does NuVox offer? 8 A. NuVox, in year 2000 at the time Trivergent 9 and later Trivergent and Gabriel 10 Communications that merged to form NuVox, 11 provided data services over -- via DSL by 12 using a Nortel Passport product and 13 installing our own modems. I believe at 14 the time we used Adtran modems. I'm not 15 positive. Some customers still have that 16 service. So, in a sense, we do offer DSL 17 service now. 18 Q. But that doesn't involve a BellSouth 19 facility? 20 A. That does not -- Well, it involves a 21 BellSouth loop. 22 Q. But you're not using the loop to provide 23 the high-frequency portion of that? 24 A. I'm not positive if we are or not. I'm 25 not positive of that.</p>
<p style="text-align: right;">Page 188</p> <p>1 TELRIC charge, so yes. 2 Q. Why? You don't use the high-frequency 3 portion of the loop. 4 A. Is BellSouth willing to not charge me for 5 the high-frequency portion of the loop in 6 the event that I'm only providing voice 7 services to a customer? 8 Q. That's not the question. Why would you 9 want to charge BellSouth for using the 10 high-frequency portion of your loop to 11 serve a customer with data pursuant to a 12 commission order? 13 A. BellSouth would be deriving income from 14 the provision of services over a loop that 15 NuVox is paying for and, in a sense, for 16 BellSouth underwriting, and we would seek 17 to receive from BellSouth some amount 18 related to that -- that -- the charge 19 for that loop. 20 Q. Do you believe that -- or do you have a 21 preference as to how the FastAccess 22 service would be provisioned to your end 23 user? 24 A. I don't have a preference. 25 Q. Currently, NuVox has no business plans to</p>	<p style="text-align: right;">Page 190</p> <p>1 Q. But, in any event, you're not using or 2 reselling BellSouth's FastAccess? 3 A. We are not reselling BellSouth's 4 FastAccess. That is accurate. 5 Q. And you're not purchasing BellSouth's 6 wholesale DSL product? 7 A. We are not purchasing BellSouth's 8 wholesale DSL product, that I'm aware of 9 There may be a customer in the network 10 somewhere, but I'm not aware of that. 11 Q. Do you know how many customers are 12 currently receiving this DSL product? 13 A. I don't have a number. 14 Q. Do you have an understanding of the 15 magnitude? 16 A. It's some minimal portion of our overall 17 customer base. 18 Q. Do you have a percentage? 19 A. I do not have a percentage. 20 Q. Do you believe it's less than 5 percent? 21 A. I don't have any way to calculate it at 22 this point. 23 Q. Why not? 24 A. Because our primary delivery mechanism at 25 this point is to provide integrated T-1</p>

20 (Pages 187 to 190)

<p style="text-align: right;">Page 191</p> <p>1 service. And we are not, as I understand 2 the product service offerings at this 3 time, focusing on selling a DSL product. 4 Q. So any customer that currently is 5 receiving a DSL product from NuVox is a 6 grandfathered customer? 7 A. In a sense, yes 8 Q. Okay. Let's talk about EEL audits. 9 A. Okay. 10 Q. Is it fair to characterize the Joint 11 Petitioners' position regarding the notice 12 required in the EEL audit is that they 13 believe it should include identification 14 of the circuits that form the cause for 15 the audit? 16 A. I believe that the notice should identify 17 the circuits that BellSouth has a concern 18 about. If that becomes cause for the 19 audit, yes, identify those specific 20 circuits. 21 Q. So you believe that BellSouth providing a 22 notice and by identifying certain circuits 23 would not constitute cause? 24 A. If BellSouth provided notice and 25 identified certain circuits and also</p>	<p style="text-align: right;">Page 193</p> <p>1 too -- that raised a bona fide concern, 2 the audit would be related to those 3 specific circuits, yes 4 Q. So you would take the position that 5 BellSouth could not identify any other 6 circuits other than those that are 7 identified in the notice? 8 A. That's -- Yes. 9 Q. Does the FCC require that a notice 10 identify all circuits that form the basis 11 of the cause? 12 A. The FCC requires limited -- or allows 13 limited audits that are related to a 14 concern over the use of those circuits. I 15 don't know if it's -- the FCC 16 specifically requires a notice to identify 17 certain circuits. 18 Q. Let me give you a hypothetical. BellSouth 19 provides notice of its belief that a 20 hundred or more circuits are improperly 21 being priced as EELs and provides you with 22 identification of those circuits. 23 Unbeknownst to BellSouth, there are 24 additional circuits that also should not 25 be priced as EELs. And it was not until</p>
<p style="text-align: right;">Page 192</p> <p>1 provided documentation or some indication 2 as to the underlying reason for wanting to 3 audit those circuits, that that would be 4 the cause. 5 If BellSouth sent me a notice 6 tomorrow indicating that it wanted to 7 audit 100 circuits that NuVox had 8 converted from special access circuits to 9 EELs, without any additional information, 10 I don't believe that that would pass 11 muster. I don't believe that that would 12 be cause. It has to be some factor 13 related to the use of those circuits that, 14 in BellSouth's -- through BellSouth's 15 traffic studies or its provision of 16 services to certain customers, indicates 17 that NuVox -- NuVox's original 18 certification related to that conversion 19 was inaccurate. 20 Q. If BellSouth identifies a hundred circuits 21 that it believes are improperly priced at 22 EELs, is it the Joint Petitioners' 23 position that the audit can only encompass 24 those 100 circuits? 25 A. If BellSouth also provided documentation</p>	<p style="text-align: right;">Page 194</p> <p>1 an audit was performed against the 2 universe of EELs that BellSouth could find 3 out that information. 4 Is it your position that the Joint 5 Petitioners would prohibit BellSouth from 6 conducting an audit for any circuit other 7 than those originally identified by 8 BellSouth? 9 A. Not necessarily. If BellSouth conducted 10 an audit of a hundred circuits, that it 11 identified and provided a legitimate 12 concern for -- 13 Q. Uh-huh. 14 A. -- the audit was conducted by an 15 independent auditor, if -- and that 16 auditor found noncompliance that warranted 17 another look at additional circuits, NuVox 18 would not object to expanding that audit. 19 Q. To what degree? 20 A. That's tough to say. I mean, let's say, 21 for example, that the audit of a hundred 22 circuits came back and three of those 23 circuits were used solely for data as 24 opposed to any local voice traffic. I 25 don't necessarily know if that -- I can't</p>

21 (Pages 191 to 194)

<p style="text-align: right;">Page 203</p> <p>1 prices. We get those prices in a certain 2 state. If we buy out of a tariff special 3 access, we get those prices. We can 4 account for our use of those services and 5 what we believe those underlying services 6 are going to cost us as part of our cost 7 of goods sold. 8 So in an underbilling situation, 9 the amount charged for the services would 10 be less than we may account for in our 11 cost of goods sold. 12 In a backbilling situation, that's 13 an issue where you've got the cost of 14 goods sold, you provide services to your 15 end users, and sometime after you've 16 closed your books for that month or that 17 year, you receive a bill for things that 18 you had no idea you were getting charged 19 for; an example of that being the transit 20 traffic issue in Georgia. 21 Q. Do you have any accounting background? 22 A. Very little. 23 Q. How about your company, NuVox, does it 24 ever backbill any customer? 25 A We have a -- In our tariffs, we have --</p>	<p style="text-align: right;">Page 205</p> <p>1 Q. Yeah, I follow you. If a customer -- For 2 a NuVox customer that's going to be 3 backbilled a certain amount -- 4 A. Right. 5 Q. -- that customer's going to have a longer 6 period of time than normal to pay those 7 charges? 8 A. That's right. And the reason for that is, 9 from a customer service standpoint, if you 10 hit a customer with a backbilled amount, 11 you demand it be paid in 30 days, you're 12 going to lose that customer. So... 13 Q. And if I understood you correctly, NuVox's 14 tariffs, to the extent they apply to 15 backbilling, are going to allow 16 backbilling for a period that -- would 17 allow backbilling to the extent allowed by 18 any applicable statute of limitation? 19 A. Not necessarily statute of limitations. 20 Some commissions have particular rules. 21 So whatever the state law or commission 22 rules allow, we put that in our tariff. 23 For instance, in South Carolina, I 24 believe that our tariff says we have the 25 ability to, pursuant to Commission rule,</p>
<p style="text-align: right;">Page 204</p> <p>1 whatever the state law for a particular 2 state is, is included in a tariff that 3 would allow for backbilling. 4 For instance, I believe in South 5 Carolina it's six months; in Georgia, I 6 think it's 22 months. And I'd hate to say 7 what I think some other states are. We 8 include that in our tariff. In the event 9 that we receive some charges or fail to 10 charge a customer for a service and we 11 backbill -- I can't -- I can't recall any 12 specific reason why we backbilled in the 13 past. There may have been. When there is 14 a backbilling situation, if we backbill 15 for -- let's say in South Carolina six 16 months -- 17 Q. And that's per -- Go ahead and finish. 18 A. If we've been backbilling a customer in 19 South Carolina for six months of a 20 service, we provide that customer a longer 21 period of time to repay those amounts as 22 opposed to having those amounts come due 23 upon receipt or 30 days from receipt of 24 that invoice. Do you understand what I'm 25 saying?</p>	<p style="text-align: right;">Page 206</p> <p>1 backbill for a period up to six months. 2 Q. When NuVox backbills a customer, is that 3 amount identified as a backbilled amount? 4 A. I'd have to look at an invoice. I don't 5 know -- I don't think this is -- this is 6 a frequent occurrence, and I'm not sure if 7 it is identified -- how it is identified 8 on the bill. I would -- I would 9 believe -- I believe that if we are going 10 to backbill a customer -- set of customers 11 for a particular amount, there may be a 12 bill front notice or a line item. I need 13 to check that. I just don't know. 14 Q. Could you check that? 15 A. I can check that. 16 Q. Page 102, line 6 and 7 -- 17 A. Uh-huh. 18 Q. -- I'll just read this. There's a Joint 19 Petitioners' proposal that the ability to 20 bill for services should be no more than 21 90 days, calendar days, after the bill 22 date on which the charges ordinarily would 23 have been billed. Just explain to me how 24 that would work. 25 A. Okay. Unless -- Many of the services</p>

24 (Pages 203 to 206)

<p style="text-align: right;">Page 207</p> <p>1 that NuVox and other CLECs purchase from 2 BellSouth, they purchase in advance. 3 Others they pay for after they use them. 4 So if NuVox received a bill -- 5 let's just pick a date -- September 30th 6 and our average bill from BellSouth is 7 \$3-1/2 million. We receive a bill for 8 \$3-1/2 million from BellSouth. And if 9 BellSouth failed to include on the 10 September 30 bill certain services that 11 BellSouth -- that NuVox used during the 12 month of September, BellSouth would have 13 90 days from the date of that invoice to 14 backbill NuVox for any charges it failed 15 to include on the September 30th invoice. 16 Q. Would the same period apply for services 17 billed in advance as for services billed 18 in arrears? 19 A. It would be 90 days from the -- from -- 20 I think our proposal is 90 days from the 21 day of the invoice, so, yes. In other 22 words, if BellSouth bills on September 23 30th for the elements that they 24 traditionally bill for in advance, okay, 25 and left out, let's say, a dozen loops and</p>	<p style="text-align: right;">Page 209</p> <p>1 collection of those amounts by BellSouth, 2 through no fault of BellSouth, it's an 3 error on behalf of Pine Branch. So I 4 would think that NuVox would have -- 5 would under this circumstance not be able 6 to claim that, you know, because that bill 7 was rendered after 90 days from the bill 8 where the services should have been 9 included, to object to that invoice. 10 Q. So in this second exception here we were 11 just talking about -- correct me if I'm 12 wrong -- we're not talking about 13 situations where erroneous information 14 provided by NuVox is causing some type of 15 backbilling? 16 A. Uh-huh. I think that's right. I think 17 the erroneous information provided by 18 NuVox would be covered in section 1 of it 19 Q. You also have suggested that bills -- 20 that billed amounts for services that are 21 rendered more than one billing period 22 prior to the bill date should be invalid 23 unless the billing party identifies such 24 billing as backbilling on line item 25 basis. Do you see that?</p>
<p style="text-align: right;">Page 208</p> <p>1 realized that in -- prior to December 2 31st, essentially, they would be able, 3 under the terms of this section, to 4 backbill for those amounts. After January 5 1st, under the terms of this section, they 6 would not be able to bill for that dozen 7 loops they left off the bill in September. 8 Q. Let's go to lines 17 and 18 on the same 9 page -- 10 A Okay. 11 Q -- 102 As I understand it, the Joint 12 Petitioners are proposing two exceptions 13 to this 90-day backbilling limitation. 14 And the second one is an exception for 15 charges incorrectly billed due to 16 erroneous information supplied by the 17 non-billing party. Can you give me an 18 example of that? 19 A I can give you an example of that. Let's 20 assume that BellSouth has an arrangement 21 with Pine Branch Telephone in South 22 Carolina to collect access charges for 23 NuVox for some reason. And Pine Branch 24 includes a \$5 charge on a bill and it 25 should have been 500. That -- The</p>	<p style="text-align: right;">Page 210</p> <p>1 MR. CAMPEN: What line? 2 MR. CULPEPPER: It's, I think, 3 lines 8 to 11, the same page. 4 A. That's right. 5 Q Do you have that type of language, NuVox, 6 in any contract with any carrier? 7 A. I'm not aware of any contract that 8 includes language like that. 9 Q. When you say invalid, what do you mean? 10 A. That if it's -- if it's included just as 11 a line item in a BellSouth bill, whether 12 delivered in paper form or electronic, it 13 doesn't -- there's no way for NuVox to 14 distinguish the backbilled amounts from 15 current charges, that BellSouth should 16 have to render that bill in a more 17 specific fashion within the 90-day period 18 or lose its right to -- in other words, 19 those charges would not come due with 20 another -- with the next invoice and 21 couldn't be used by BellSouth to claim 22 late payment, go into a request for an 23 additional deposit because of late 24 payment, those types of issues -- or type 25 of issues.</p>

<p style="text-align: right;">Page 211</p> <p>1 Q What about today, if BellSouth backbills 2 NuVox, is it identified separately on a 3 bill? 4 A. Some backbilling charges are not only 5 separately identified, but you'll receive 6 a letter oftentimes signed by Mr. Jerry 7 Hendricks that indicates some amount 8 that's being backbilled separately from an 9 invoice. On a month-to-month basis, I 10 don't look at every invoice, so I'm not 11 sure if that is BellSouth's usual course 12 of business. 13 Q. In your -- 14 A. Can I go back to a question you asked 15 previously? 16 You asked if NuVox had any 17 language in a contract that prohibited 18 NuVox from backbilling 90-day limit? 19 Q I asked about tariffs, contracts. 20 A Right. Right. Some contracts -- NuVox 21 does have contracts with customers where 22 we agree that the total amount of their 23 bundled service charges is going to be, 24 let's say, \$1,000 That's exclusive of 25 taxes, you know, for universal service and</p>	<p style="text-align: right;">Page 213</p> <p>1 A. Yes. It's a situation that the company 2 has notice of it They have notice of the 3 specific amount. They can dispute the 4 amount with Mr. Hendricks. Yes. 5 With -- The situation that we're 6 talking about in our testimony is where 7 backbilling amount is not identified so 8 that you can distinguish it from usual 9 monthly charges and dispute it, if a 10 dispute is appropriate. 11 Q. Can you give me an example of how it would 12 show up on a bill but not be identified as 13 a backbilled amount? 14 A. I can't give you a specific example. I 15 would imagine that -- for instance, if for 16 some reason BellSouth took the position 17 that previously filed factors for 18 percentage interstate usage and percentage 19 local usage were no longer considered good 20 from the date filed and had to provide -- 21 filed in every quarter, let's say, and 22 NuVox failed to provide the same factors 23 in one quarter and two or three quarters 24 later BellSouth sends a bill for -- that 25 is associated with a failure to provide</p>
<p style="text-align: right;">Page 212</p> <p>1 any local 911 taxes, things like that So 2 for those customers, we can't backbill. 3 Their bill is what it is every month. 4 It's a flat rate. So that language isn't 5 necessarily included, but we couldn't go 6 back and charge those customers if they've 7 agreed to a flat fee per month. 8 Q. And that's in certain customer contracts? 9 A Certain customer contracts, that's right. 10 Q. Would that be a standard contract term? 11 A It's not necessarily a standard contract 12 term It's specifically negotiated 13 between NuVox and certain customers 14 Q. And idea how many customer contracts would 15 have that type of provision? 16 A I have no idea. We do that on a fairly 17 regular basis. 18 Q. The example you gave earlier -- 19 A. Right. 20 Q. -- about getting the letter from Jerry 21 Hendricks of BellSouth -- 22 A. Uh-huh. 23 Q -- do you consider that identifying a 24 backbilled amount that would satisfy 25 Petitioners' proposal here?</p>	<p style="text-align: right;">Page 214</p> <p>1 updated factors, that bill could be a 2 significant amount. And it would be just 3 included in the line item for the 4 percentage interstate usage over a certain 5 facility. There would be no way to really 6 distinguish -- It would be a higher 7 amount than previous months. Maybe it's a 8 good amount higher. But there would be no 9 way to tell that it was for previous 10 months when NuVox failed to file a 11 factor. 12 That's a hypothetical, because 13 right now the factors we filed two years 14 ago are considered the -- good until we 15 amend those factors, but that regime could 16 change. That's just an example. 17 Q. Are you familiar with the term OCC? 18 A. What -- 19 Q. It's not in your testimony, other charge 20 or credit that could appear on a bill. 21 A. I'm not familiar with that specific term. 22 Q. If a backbilled amount was identified as 23 an other charge or credit, in your mind is 24 that sufficiently identifying that 25 backbilled amount?</p>

<p style="text-align: right;">Page 215</p> <p>1 A If it's -- If it provides specifics as to 2 what the backbilled amount is for, yes. 3 If there's a line that says OCC, for other 4 charge and credit -- rather than have a 5 clearly identified credit, there's a 6 backbilled amount owed and it explains 7 with some degree of specificity what that 8 charge is related to so that within the 30 9 days following receipt of that bill you 10 can dispute that charge, if a dispute is 11 appropriate, I don't have any problem with 12 that. 13 Q Page 104 of the direct testimony, you 14 state that BellSouth's language with 15 respect to backbilling is inadequate 16 because it fails to provide uniform 17 workable parameters. It's lines, I think, 18 12 and 13 on page 104. 19 A. Okay. Yes. 20 Q. Can you give me an example of a uniform 21 parameter? 22 A Let me look at the BellSouth language 23 Q. Sure. 24 A. What issue is that? 25 Q. It is -- It's going to be attachment 7,</p>	<p style="text-align: right;">Page 217</p> <p>1 when we set a budget, that is NuVox -- I 2 can only speak for NuVox here, we set a 3 budget, we close out of year end. If 4 there's a possibility for getting two 5 years of charges that were not accounted 6 for when we close out a budget, I don't 7 see how any of our directors -- or our 8 officers, specifically our CEO, could ever 9 sign any certifications for accountants 10 closing out a year end if they're unable 11 to take the appropriate reserves for 12 possible overbilled amounts from 13 BellSouth. 14 Q. Has NuVox ever been billed -- backbilled 15 an amount from two years ago? 16 A. I'm not certain. I know there have been 17 backbilled amounts that, you know, were 18 stunning. There's a situation now with 19 backbilled -- BellSouth is attempting to 20 backbill for transit traffic from ICOs in 21 Georgia that is related to some settlement 22 between ICOs and BellSouth to which no 23 CLECs were parties, and that is 24 disastrous. 25 So that is a -- I don't know if</p>
<p style="text-align: right;">Page 216</p> <p>1 which, I think, is one of the exhibits 2 already. 3 A Okay 4 Q It should be on page 4, attachment 7. 5 THE WITNESS: Can we go off the 6 record for a second? 7 (DISCUSSION OFF THE RECORD.) 8 A Okay. I'm looking at section -- 9 attachment 7, section 1.13. And it 10 provides for a two-year limitation period, 11 but it does have exceptions to that 12 two-year period. And I don't know if -- 13 it doesn't appear to me, just this section 14 in attachment 7, that it provides for how 15 those backbilled charges would be 16 identified on an invoice. I think that's 17 what we mean by an unworkable system, if 18 you will, for backbilling. 19 Q. So the exception, if I understood your 20 answer correctly, is not the issue, it's 21 whether or not a backbilled amount is 22 sufficiently identified? 23 A. Well, whether or not a backbilled amount 24 is sufficiently identified and it is the 25 two-year period for backbilling -- because</p>	<p style="text-align: right;">Page 218</p> <p>1 that's for two years. I don't know if 2 it's for seven years. I don't know how 3 much -- how long that goes back, so 4 Q. When you say "stunning", what do you mean? 5 A. I mean stunning in the amount that's 6 attempted to be backbilled as well as the 7 fact that the ICOs and BellSouth, without 8 inclusion of CLECs or other parties in the 9 process, have decided that they will -- 10 BellSouth will act as the ICO's collection 11 agency for transit amounts that the CLECs 12 were unaware they'd be billed for. 13 Q. Is NuVox a party to any of these contracts 14 between BellSouth and these ICOs? 15 A. No. This is a settlement solely between 16 BellSouth and the ICOs. 17 Q. Let's move on to issue 101, maximum amount 18 of deposit. And you might want to look at 19 your direct testimony starting at page 20 123. 21 A. Okay. 22 Q. The Joint Petitioners propose two 23 different deposit caps, one for existing 24 customers of up to two months and one for 25 new customers of up to six weeks; right?</p>

Page 219	Page 221
<p>1 A. I think they've got it backwards. 2 Q. Got it backwards? 3 A. Yes I think it's month-and-a-half for 4 existing CLEC customers and two months for 5 new CLEC customers that don't have any 6 past history. That's right. 7 Q. How did you come up with that proposal? 8 A. Well, we came up with that proposal 9 because, over the past eight years -- or 10 seven years, about -- at least once a 11 year, and it seems like every six months, 12 we talk with BellSouth about deposit 13 issues. 14 And after having a seven-year 15 history with BellSouth and paying bills on 16 a monthly basis, it seems that NuVox has a 17 good business history with BellSouth and 18 should not be required to have the same 19 deposit criteria, I guess, as a new CLEC 20 that has no operating history, no past 21 payment history with BellSouth, just a 22 distinction between two different CLEC 23 businesses, a new business and one that's 24 established. 25 Q Tell me a little bit about your history</p>	<p>1 months of billings of invoices, tries to 2 come up with some figure, but does not 3 take into account in those two months of 4 invoices amounts that are in dispute or 5 the amounts that -- in an invoice that are 6 prepaid so that, in the event Armageddon 7 occurred, BellSouth would only be out for 8 amounts that were paid for usage as 9 opposed to amounts that were paid in -- or 10 prepaid. Amounts prepaid, you already 11 have your payment for the services that 12 NuVox would use over a 30-day period. 13 There's no reason to have a deposit for 14 those amounts. 15 Q. If I understood you correctly, is it your 16 testimony that BellSouth has only demanded 17 additional deposit amounts from NuVox in 18 your seven or eight years? 19 A That each time we have received a letter 20 from Sandra Riseti or one of the people 21 in her group is to -- usually to try to 22 increase our deposit. We've never -- 23 Q. Usually -- 24 A. We've never received a letter or 25 notification from BellSouth's deposit</p>
Page 220	Page 222
<p>1 with respect to deposits with BellSouth. 2 When I say "you", I'm talking about NuVox. 3 A. When State Communications originally 4 started doing business, we had a, I 5 believe, \$200,000 deposit with BellSouth. 6 We received a letter from BellSouth. 7 Sandra Riseti's group indicated, we've 8 received your deposit. After we have a 9 year operating history, we'll review 10 this. And we operated for a year. Sandra 11 only wanted more of a deposit. We paid 12 every BellSouth bill for that year. I 13 believed we were entitled to get the 14 deposit back. BellSouth wanted more of a 15 deposit 16 It seems like every time we turn 17 around, BellSouth wants a greater amount 18 for deposit. We work for six, eight weeks 19 trying to negotiate something, eventually 20 come to some amount the parties can agree 21 on, and we agree to look at it again in a 22 year, some period down the road. 23 The reason that NuVox has had -- 24 taken issue with BellSouth's deposit 25 process is that BellSouth looks at two</p>	<p>1 group that included a check, thank you for 2 being a good customer, we no longer 3 require a security to continue to do 4 business with NuVox or we're decreasing 5 We have in the past, I believe, 6 lowered our deposit after negotiating with 7 BellSouth's deposit group and going 8 through a number of elements related to 9 our business: Credit scores, past payment 10 history, et cetera. 11 So on -- I didn't mean to 12 indicate that on every occasion we 13 increased our deposit amount, but usually 14 the initial request is for an increase in 15 deposit amount. 16 Q. When you say lower the deposit amount, how 17 does that happen? 18 A. Lower the deposit amount. 19 Q. BellSouth sends you back a check for part 20 of the deposit; right? 21 A. Well, usually -- or releases a letter of 22 credit, so not necessarily sends back a 23 check, but may release a portion of a 24 letter of credit. You'll amend the letter 25 of credit from a \$2 million letter of</p>

28 (Pages 219 to 222)

<p style="text-align: right;">Page 223</p> <p>1 credit to a million dollar letter of 2 credit, so not necessarily a check coming 3 back. 4 Q. What is the current deposit that NuVox has 5 with BellSouth? Do you know? 6 A. I'm not certain. I think it's -- I think 7 it's between a half million and a million 8 dollars. I'm not positive. 9 Q. Does that deposit take into account 10 NewSouth billings, also? 11 A. I think NewSouth has a separate deposit 12 right now because they are still at this 13 point two separate operating companies. 14 We will consolidate the companies as of 15 January 1st. At least that's our plan 16 right now. 17 Q. Of 2005? 18 A. Of 2005. That depends on a lot of things 19 coming into play in the next two weeks. 20 At that time, I think we'll have a single 21 deposit as opposed to two separate 22 deposits. 23 Q. Now, is it your testimony that BellSouth 24 has not submitted or refunded any monies 25 to NuVox?</p>	<p style="text-align: right;">Page 225</p> <p>1 level, but -- and if BellSouth did refund 2 a check to us, they did it. I just -- I 3 just can't recall whether it was a refund 4 of a check or a reduction of a letter of 5 credit. 6 At one point -- originally when 7 we did our first deposit, I believe we 8 sent BellSouth money. Later, we 9 transferred that to letters of credit. 10 And the reason that I remember that is 11 because Gabriel Communications that we 12 merged with -- finance department was from 13 Gabriel. They preferred using letter of 14 credits as opposed to having amounts on 15 deposit with BellSouth. So how we 16 basically shifted assets under those 17 shells, be it a letter of credit or actual 18 amounts on deposit, I just can't recall. 19 Q. And when I say a check or refund, I'm also 20 talking about a wire transfer of monies. 21 A. Yeah. I mean, that very well could have 22 happened. I recall at least one occasion 23 where we began negotiating deposits where 24 it was agreed to by the parties -- and 25 Langley Ketchings was involved, Sandra</p>
<p style="text-align: right;">Page 224</p> <p>1 A. No. Over the -- Over the course of the 2 last seven years, there has been an 3 instance where, let's say -- and I can't 4 recall exact figures, we had a \$2 million 5 deposit and it was lowered to a million or 6 a million-five. 7 So if you consider that a refund 8 of money, yes, but I think the way we 9 handle it, we've always had a letter of 10 credit, so we just reduced that letter of 11 credit. In other words, less money was 12 tied up and apportioned to BellSouth 13 deposit than had been the day before. 14 Q. So effectively that's a reduction in the 15 deposit amount, isn't it? 16 A. That's true. 17 Q. Is it your testimony that NuVox has never 18 received a check from BellSouth as part of 19 a refund of the deposit? 20 A. I don't -- Again, I'm not positive if 21 we've ever received a check. I know there 22 was at least one situation where we got in 23 deposit discussions and the parties agreed 24 that it was not appropriate to increase 25 NuVox's deposit or keep it at the prior</p>	<p style="text-align: right;">Page 226</p> <p>1 Riseti -- where the parties agreed, yes, 2 NuVox you're right. Your credit history 3 is good. You've been in business for six 4 years. We no longer require -- I'm just 5 throwing this figure out -- a \$2 million 6 deposit, it's now a million and a half. 7 So in a sense, \$500,000 or whatever amount 8 it was was released to NuVox. Whether 9 that came in by wire transfer or letter of 10 credit reduction, cash, check, I'm not 11 positive. 12 Q. Who would know at NuVox? 13 A. Used to be Dan Carpel, who was formally 14 with the St. Louis headquarters of NuVox. 15 I don't know if he is still with the 16 company. Most likely Steve Shoemaker, who 17 is the CFO for NuVox. 18 Q. Do you know whether the current deposit 19 amount that NuVox has with BellSouth, 20 which I understand you to say is a letter 21 of credit -- 22 A. Uh-huh. 23 Q. -- is it equal to two month's billing? 24 A. It's not. 25 Q. Why isn't it?</p>

29 (Pages 223 to 226)

<p style="text-align: right;">Page 227</p> <p>1 A. Because that would be \$7 million. 2 Q. Subject to check, would you agree with me 3 that it's a million dollar letter of 4 credit? 5 A. Subject to check, I would agree with that. 6 Q. And that's one-seventh of \$7 million? 7 A. Well, that's one-seventh of \$7 million, 8 but that also takes into account amounts 9 on dispute with BellSouth at any time -- 10 or average amounts on dispute. 11 BellSouth's record of posting or 12 recognizing those amounts on dispute -- 13 and it also takes into account amounts 14 that are prepaid by NuVox/NewSouth on a 15 regular basis as opposed to services used 16 over the course of a month that would more 17 readily be susceptible to a deposit -- to 18 justification for a deposit. 19 Q. Let's look at page 123. 20 A. Uh-huh. 21 Q. Lines 10 and 11. There's a statement 22 there, it is not typical in commercial 23 relationships for one side to continually 24 try to extract deposits from the other 25 A. Uh-huh.</p>	<p style="text-align: right;">Page 229</p> <p>1 Q. But that's not always the case? 2 A. Not always the case, but nine times out of 3 ten. 4 Q. And the tenth time out of ten just 5 happened to be this past year? 6 A. Oh, I mean, I don't know if it was the 7 tenth, but every six months, however -- 8 we've gone through this, you know, easily 9 a half dozen times. 10 Q. What about your customers -- 11 A. Uh-huh. 12 Q. -- do you have any deposit requirements 13 with your customers? 14 A. Our tariffs mirror whatever the state law 15 regarding tariffs is -- I mean regarding 16 deposits, I guess. For instance, I think 17 in South Carolina the rule is you can get 18 up to two months of what you would expect 19 a customer to bill. We do not, as a 20 matter of -- as a day-to-day business 21 practice require deposits from all of our 22 customers. We look at their credit. We 23 look at what they're -- what type of 24 commitment they're making in terms of term 25 commitment, and often waive deposit</p>
<p style="text-align: right;">Page 228</p> <p>1 Q. Do you see that statement? 2 A. (Witness nods head up and down.) 3 Q. Now, has BellSouth continually tried to 4 extract a deposit from NuVox after what we 5 just talked about? 6 A. I get a call from Sandra Riseti or one of 7 the people in her group about every six 8 months. In fact, the latest one was in 9 September of this year or August. 10 Received a letter from somebody in her 11 group. I used to know them all by first 12 name, but there's been turnover. 13 Contacted that person. Said, look, we're 14 in this arbitration. Deposit is at 15 issue. Can we revisit this if we get this 16 issue resolved? And they said, sure, but 17 let's touch base from time to time to see 18 where we are on that issue. 19 So about every six months, we talk 20 about this. And usually -- and our past 21 experience is that the credit group is 22 looking for additional amounts on deposit 23 rather than a unilateral call from 24 BellSouth that they're ready to send us 25 back some more of our money.</p>	<p style="text-align: right;">Page 230</p> <p>1 requirements or do not request a deposit 2 from customers. 3 But our tariff does give us the 4 right to ask for one. And also the state 5 of competition is such that if you are -- 6 if you are in a competitive bid situation, 7 you never get a deposit. 8 Q. You mentioned deposit criteria -- 9 A. Uh-huh. 10 Q. -- earlier. 11 A. Uh-huh. 12 Q. You have -- As I understood your 13 testimony, you have some deposit criteria 14 in place today between NuVox and 15 BellSouth? 16 A. (Witness nods head up and down.) 17 Q. And that's a yes? 18 A. Between NuVox and BellSouth, yes. I 19 believe there are certain factors that the 20 deposit -- I don't know what the group is 21 called, credit and collections group at 22 BellSouth uses to come up with their 23 deposit request, is my understanding. 24 Q. What about from a deposit criteria 25 standpoint, would you agree with me that</p>

<p style="text-align: right;">Page 231</p> <p>1 that should be objective?</p> <p>2 A It should absolutely be objective, yes.</p> <p>3 Q. Would you consider a deposit criteria that</p> <p>4 stated that a deposit may be required from</p> <p>5 a customer whose credit history was</p> <p>6 unacceptable or unavailable to be an</p> <p>7 appropriate --</p> <p>8 A. Well, I don't know if that's objective.</p> <p>9 Who determines what is an unacceptable</p> <p>10 credit history?</p> <p>11 For instance, we've been in</p> <p>12 business now for seven years. We've paid</p> <p>13 BellSouth every invoice, as I know, for</p> <p>14 seven years. Probably over the course of</p> <p>15 the relationship paid BellSouth hundreds</p> <p>16 of millions of dollars, yet we still have</p> <p>17 a deposit. If I'm -- If I'm an</p> <p>18 individual consumer in any state, as I</p> <p>19 know it, and I pay BellSouth for a year</p> <p>20 for services, have a good payment history,</p> <p>21 I can demand to get my deposit back. This</p> <p>22 contract does not allow -- or our current</p> <p>23 contract does not allow us to demand our</p> <p>24 deposit back under any objective set of</p> <p>25 circumstances.</p>	<p style="text-align: right;">Page 233</p> <p>1 don't know if that is an objective</p> <p>2 formula.</p> <p>3 Q. Let's put it like this. Would NuVox agree</p> <p>4 to such a standard with BellSouth?</p> <p>5 A. We would agree with an objective set of</p> <p>6 circumstances and also some means by which</p> <p>7 NuVox could earn back, through some course</p> <p>8 of conduct, be it payment history, et</p> <p>9 cetera, its deposit amount -- its deposit</p> <p>10 on deposit -- the amounts on deposit with</p> <p>11 BellSouth.</p> <p>12 Q. Isn't that happening today with NuVox?</p> <p>13 A. Well, we're seven years down the road and</p> <p>14 we still have a million dollar letter of</p> <p>15 credit with BellSouth, so I don't know</p> <p>16 what we'd have to do to win back in total</p> <p>17 our amounts on deposit. We have received</p> <p>18 an amount back from BellSouth, yes, but --</p> <p>19 Q. What does the letter of -- the million</p> <p>20 dollar letter of credit cost NuVox? Do</p> <p>21 you know?</p> <p>22 A. I'm not familiar with how -- how that</p> <p>23 letter of credit operates. I believe that</p> <p>24 it ties up or reserves a million dollars</p> <p>25 in the institution that we have the letter</p>
<p style="text-align: right;">Page 232</p> <p>1 Q What about a deposit requirement that said</p> <p>2 a deposit may be required if the</p> <p>3 customer's financial -- if the customer's</p> <p>4 financial situation is not acceptable to</p> <p>5 the company or it's not a matter of</p> <p>6 general knowledge?</p> <p>7 A. Well, I mean, again, I don't know if</p> <p>8 that's objective, because the company can</p> <p>9 decide. For instance, at one time we were</p> <p>10 in a dispute with BellSouth about our</p> <p>11 deposit. The amount in deposit --</p> <p>12 BellSouth indicated we didn't have enough</p> <p>13 cash on reserve to justify what we</p> <p>14 believed was an appropriate deposit</p> <p>15 amount. We received a capital infusion</p> <p>16 of -- I don't know -- tens of millions</p> <p>17 of dollars, but -- and provided BellSouth</p> <p>18 with that information. It didn't</p> <p>19 necessarily -- It did not, as I recall,</p> <p>20 change the deposit amount that BellSouth</p> <p>21 wanted. My point being our credit -- or</p> <p>22 our cash on hand improved significantly.</p> <p>23 That appears to be an objective criteria</p> <p>24 to me, but it did not change BellSouth's</p> <p>25 position with regards to deposit. So I</p>	<p style="text-align: right;">Page 234</p> <p>1 of credit with, and the letter of credit</p> <p>2 is on behalf of BellSouth, and BellSouth</p> <p>3 would have to take steps -- certain steps</p> <p>4 pursuant to that letter of credit to get</p> <p>5 that amount of money released. So it's in</p> <p>6 the financial institution, but it's not at</p> <p>7 our disposal. So what does it cost us to</p> <p>8 keep that letter of credit, it costs us</p> <p>9 the use of that million dollars.</p> <p>10 Q. So it's your testimony that a letter of</p> <p>11 credit of a million dollars costs NuVox</p> <p>12 the same as sending BellSouth a check for</p> <p>13 a million dollars?</p> <p>14 A. It's probably not as favorable because I</p> <p>15 think BellSouth pays 8-percent interest on</p> <p>16 deposit amounts. Maybe I'm wrong about</p> <p>17 that. But it -- it -- the company --</p> <p>18 the company's financial management --</p> <p>19 senior management has decided to use a</p> <p>20 letter of credit. In their mind, that</p> <p>21 must be more favorable than actually</p> <p>22 putting cash on hand with BellSouth. I</p> <p>23 don't know why they chose to do that</p> <p>24 Q. Also, let's go to the same page, 123.</p> <p>25 A. Uh-huh.</p>

<p style="text-align: right;">Page 235</p> <p>1 Q. Lines 12 to 13. Explain to me what you 2 mean when you say, Petitioners agree to 3 language that expands BellSouth's right to 4 collect deposits well beyond what is found 5 in typical tariffs. What do you mean by 6 "typical tariffs"? 7 A. Well, I -- without looking at BellSouth's 8 tariffs sections, when we -- our last 9 heavy go with the credit collections 10 group, when Langley Ketchings was involved 11 and -- I believe that we agreed to some 12 sort of less objective criteria for a 13 later review of the deposit situation. I 14 think six months later, we agreed we can 15 review it again and that the deposit group 16 -- credit and collections group could -- 17 they said, we would like to consider these 18 factors. In exchange for that, we'll 19 agree to a deposit amount of X, whatever 20 we agreed to at the time. And we said, 21 that sounds like a good deal. It was 22 basically to get -- it was to get the 23 deposit issue resolved. We had been 24 working on it for, it seems like, months. 25 This is two years ago at the time, I</p>	<p style="text-align: right;">Page 237</p> <p>1 A. I'm talking about the balances -- that 2 NuVox has a working history with 3 BellSouth. Unless we're building out new 4 collocation sites, when your invoices 5 shoot up because of construction costs, et 6 cetera, if your -- the amount of any 7 invoice is not going to drastically change 8 from month to month. You know, we'd like 9 to think that as we provide services to 10 more customers on a month-to-month basis 11 it's going to steadily move up, but I 12 don't think you're going to see in any 13 month to month any skyrocketing of basic 14 service costs, so I think they're somewhat 15 predictable. 16 Q. Predictable by who? 17 A. By BellSouth and by NuVox. I mean, we 18 look at our -- we go through budget. We 19 look at how we -- what our growth should 20 be, what our cost of goods sold should 21 be. You know, now we have -- without the 22 changes that would come to the BellSouth 23 bill because of building our collocations, 24 I think we have probably 18 months of 25 history of just pure service usage. So, I</p>
<p style="text-align: right;">Page 236</p> <p>1 think. 2 Q. But what is your reference to "typical 3 tariffs"? I mean, what are you referring 4 to? 5 A. Typical tariffs would be -- my 6 understanding is that, you know, 7 BellSouth's, quote, unquote, typical 8 tariff for a retail customer allows for up 9 to two months of deposit and that 10 BellSouth has in its tariffs some specific 11 language for how it justifies a deposit 12 request or an amount on deposit by a 13 consumer, so those tariff sections. 14 Q. In short, the reference of typical tariff 15 on page 123 is a reference to BellSouth's 16 tariffs? 17 A. Yes. 18 Q. Let's turn to the next page, 124, lines 5 19 through 7 where the state -- here we're 20 talking about a deposit amount for 21 existing CLPs is reasonable given that 22 balances can be predicted with reasonable 23 accuracy. Do you see that statement? 24 A. Uh-huh. 25 Q. What balances are you talking about?</p>	<p style="text-align: right;">Page 238</p> <p>1 mean, I think you could take a delta and 2 figure out, okay, a month-to-month basis 3 that NuVox's billings with BellSouth are 4 going up 3 percent, so -- by both 5 parties. 6 Q. Who's in the best position to predict 7 NuVox's balances? 8 A. I wish either of us were now, given the 9 way these rules might change, but if 10 things stay the same, probably NuVox 11 Q. Page 126, you make a reference that 12 BellSouth has agreed to a lesser maximum 13 security deposit amount with at least one 14 other CLP. 15 Actually, it's on page 126, lines 16 18 through 20 of the rebuttal testimony, 17 and that's the next exhibit, Exhibit 2. 18 A. Okay. 19 Q. What CLP are you referring to? 20 A. Hold on one second. Let me figure out 21 where I am now. No, that's not it. It's 22 in here somewhere. Okay, this is Exhibit 23 1. I hope I haven't jumbled these things 24 up. Remind me of the page, again. 25 Q. It's page 126 of the rebuttal testimony.</p>

<p style="text-align: right;">Page 239</p> <p>1 A. I believe I learned of that information 2 through an organization that we're a 3 member of, CompSouth. I'm not aware of 4 exactly which member of CompSouth, because 5 my guess is it's confidential, what 6 deposit requirements were, but if each 7 individual CLEC, I'm sure, negotiates with 8 the deposit group of BellSouth and the -- 9 I have been told that at least one member 10 of CompSouth has a different deposit -- 11 set of deposit criteria than is being 12 applied to NuVox. I could find that out. 13 Q Could you find that out for me, please? 14 A. I'll let you know. 15 Q. Let's talk about issue 102, this offset 16 provision. 17 A. Uh-huh. 18 Q. Do you have any such offset provision in 19 any agreement today regarding offsetting 20 of amounts owed against a deposit amount? 21 A. In what context? 22 Q Well, I believe -- let's start with the 23 interconnection agreement. Is it in -- 24 Is it in your current interconnection 25 agreement with BellSouth?</p>	<p style="text-align: right;">Page 241</p> <p>1 A. Because I'm not sure if I'm going to catch 2 Sandra on a good day or a bad day. If 3 that's what they do, let's just put it in 4 the contract and then we'll be fine. If 5 they do that only on occasion, it's even 6 more of a reason to put it in the 7 contract. 8 Q. Issue 103, right to terminate service 9 because of nonpayment of a deposit. 10 A. Uh-huh. 11 Q. Now, has that ever happened to NuVox? 12 A. It has not happened. 13 Q. Are you aware of BellSouth terminating 14 service because of nonpayment of a deposit 15 with any other CLEC? 16 A. I'm not aware that it has happened. Our 17 issue with that contractual -- proposed 18 contractual term is if we can't agree on a 19 deposit -- and we've had a good history of 20 working these issues out, but if we can't 21 for whatever reason, we come to an 22 impasse, it shouldn't be -- BellSouth 23 shouldn't have the right to essentially 24 turn off our access to provisioning 25 services or turn off our -- or shut down</p>
<p style="text-align: right;">Page 240</p> <p>1 A. To offset amounts owed by -- by BellSouth 2 to NuVox in coming up with a deposit 3 requirement? I don't think it's in 4 our -- I know it's not in our current 5 agreement I think the deposit language 6 requires two months. But that is a factor 7 that has been taken into account by 8 BellSouth when we've discussed deposits in 9 the past. 10 Q. It has been taken into account by 11 BellSouth? 12 A. Yes, meaning -- meaning if NuVox has 13 disputed -- let's just say -- \$50,000, 14 and BellSouth has recognized that dispute 15 but not posted that dispute to NuVox's 16 invoice, BellSouth will subtract that 17 amount -- Sandra's group will subtract 18 that amount in coming up with the two 19 months with her baseline amount. So as a 20 practical matter, I think that does go 21 into her equation somehow. 22 Q. Well, if -- Well, if, as a practical 23 matter, it goes into the deposit equation 24 today, why does it need to be specifically 25 added to the contract?</p>	<p style="text-align: right;">Page 242</p> <p>1 our network It should be something that 2 should go to dispute resolution. 3 I'm not aware that BellSouth has 4 done that in the past to any CLEC, but I 5 don't know if it's had that right in any 6 interconnection agreement, deposit amount 7 -- disputes fall back to dispute 8 resolution. 9 Q. Well, what happens under the dispute 10 resolution clause in that instance under 11 the Joint Petitioners' language? 12 A. I'd have to look at the dispute resolution 13 provision. I'm not readily familiar with 14 how it would occur, but I believe that the 15 parties would try to work out the deposit 16 language. If it didn't work out, go to 17 dispute resolution. If we had to, we'd go 18 before a commission to decide the deposit 19 amount. I'm not positive. But we would 20 continue conducting business as is until 21 the dispute got resolved rather than have 22 a situation where one party can, you know, 23 put a gun to the other party's head and 24 say, either you pay us this deposit or 25 we're going to turn off your -- turn down</p>

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<p>1 your network.</p> <p>2 Q And, again, you're not aware of that ever</p> <p>3 being --</p> <p>4 A. I'm not aware of that ever -- that</p> <p>5 happening. I'm not aware that BellSouth</p> <p>6 ever had the right to do that.</p> <p>7 Q Is it fair to say, Mr. Russell, that, in</p> <p>8 your experience, that NuVox and BellSouth</p> <p>9 have been able to resolve any deposit</p> <p>10 issues?</p> <p>11 A. That's correct.</p> <p>12 Q. How about issue 106, notice of suspension</p> <p>13 of termination of service.</p> <p>14 A. Uh-huh.</p> <p>15 Q. Has your company received such a notice</p> <p>16 before?</p> <p>17 A We have in the context of a past-due bill</p> <p>18 received a notice that if the bill was not</p> <p>19 paid within a certain time frame, that we</p> <p>20 would lose access to certain systems. So</p> <p>21 that is essentially a notice of</p> <p>22 termination of service, if you will. In</p> <p>23 that instance and on more than one</p> <p>24 occasion, the notices were sent to the</p> <p>25 wrong person. And on at least more than</p>	<p>1 he'll say, I have one of these notices. .I</p> <p>2 just want to let you know about it. And</p> <p>3 I'll say, well, Andrew, does this take</p> <p>4 into account any disputed charges? And he</p> <p>5 won't know or it doesn't. In other words,</p> <p>6 this is has happened -- you know, it has</p> <p>7 not happened in the last year-and-a-half,</p> <p>8 but it has happened -- it had happened</p> <p>9 from time to time between probably year</p> <p>10 2000 and 2002.</p> <p>11 Q. Line -- Page 137 of your rebuttal</p> <p>12 testimony.</p> <p>13 A. Uh-huh.</p> <p>14 Q. Lines 10 and 11. Your statements there</p> <p>15 is -- or actually just go to line 10.</p> <p>16 BellSouth can bury critical notices in</p> <p>17 thick piles or files of billing</p> <p>18 materials.</p> <p>19 A. Uh-huh.</p> <p>20 Q. Has that happened to NuVox?</p> <p>21 A. It happened in the last two months. A</p> <p>22 notice was sent to Tony Nelson, who has</p> <p>23 not been with NuVox in 18 months, notice</p> <p>24 section, that we've notified Andrew</p> <p>25 Calderello. Andrew revised the notice</p>
Page 244	Page 246
<p>1 one occasion, the notices were inaccurate</p> <p>2 because they did not take into account</p> <p>3 amounts credited to NuVox's account.</p> <p>4 Q. Was service ever terminated or suspended?</p> <p>5 A. Service was never terminated or suspended,</p> <p>6 but we have had to get some folks on the</p> <p>7 phone in BellSouth to assure us that that</p> <p>8 would not occur.</p> <p>9 Q. Who were those folks?</p> <p>10 A. I believe that Brad Mutschelknaus from</p> <p>11 Kelley Drye made a call for us in around</p> <p>12 June of 2000 to someone at BellSouth. I'm</p> <p>13 not sure who his contact was. And that</p> <p>14 was related to one of these notices. I</p> <p>15 don't know who the person was. I was in a</p> <p>16 -- We were in a company retreat for</p> <p>17 management, and we literally made the call</p> <p>18 from the highway to Brad, so...</p> <p>19 Q. Are you aware of any other instances where</p> <p>20 NuVox received some type of notice of</p> <p>21 termination or suspension other than this</p> <p>22 instance in 2000?</p> <p>23 A. Oh, I've spoken to Andrew Calderello a</p> <p>24 half dozen times over the past -- the</p> <p>25 times that he's been our account rep where</p>	<p>1 section, revised the notice section, and</p> <p>2 it just doesn't. So in that sense, it may</p> <p>3 not have been buried, but nobody at the</p> <p>4 company --</p> <p>5 Q. It sounds like it was misrouted?</p> <p>6 A. Misrouted.</p> <p>7 Q But, to your knowledge, does BellSouth</p> <p>8 bury the notice in a bill, a notice of</p> <p>9 suspension?</p> <p>10 A. It has happened in the past. I'm not sure</p> <p>11 when the last time was. In other words,</p> <p>12 you receive bills on the same day you</p> <p>13 receive -- this is when we were getting</p> <p>14 paper bills now. You received notice of</p> <p>15 termination, you know, bills or --</p> <p>16 banker's boxes. So these notices don't</p> <p>17 come in a Federal Express pack or a</p> <p>18 certified letter that -- that by their</p> <p>19 very packaging indicate this is more</p> <p>20 important than any other notice we receive</p> <p>21 from BellSouth on a day-to-day basis, as I</p> <p>22 understand it.</p> <p>23 Q. You mentioned NuVox receives electronic</p> <p>24 bills; right? Does NuVox receive any</p> <p>25 paper bills from BellSouth?</p>

<p style="text-align: right;">Page 247</p> <p>1 A. I'm sure we've received some paper bills. 2 Most of our cap -- I'm sorry, I don't want 3 to say cap billing. Our -- The usual 4 monthly bills are sent electronically, as 5 I understand it, and have been for some 6 time. We used to receive paper bills. 7 Q. But now? 8 A. Most of our billing is electronic. I'm 9 sure that -- for instance, when I received 10 the backbilling notice from Jerry 11 Hendricks, that was a paper bill. 12 Q. Understood. Let's go to attachment 6. 13 A. Okay. 14 Q. Let's talk about issue 94, which is mass 15 migration, mergers and acquisitions 16 process. 17 A. Uh-huh. 18 Q. NuVox and NewSouth announced a merger in 19 May of this past year; right? 20 A. That's correct. 21 Q. What is the status of that merger? 22 A. We are still working on integration, so it 23 is not NuVox, Inc., the holding company 24 for NuVox Communications, Inc., acquired 25 the NewSouth Communications Holding, Inc.,</p>	<p style="text-align: right;">Page 249</p> <p>1 merger -- receiving the NewSouth 2 Communications, Inc., assets. So, yes, 3 that's accurate. 4 Q. Was any business case or analysis done as 5 to the -- you know, I guess profitability 6 or whatever term you want to use as to the 7 merger between NewSouth and NuVox? 8 A. I'm sure it was. 9 Q. Did you review it or see it? 10 A. I worked on the due diligence related to 11 NuVox's acquisition of -- or the merger 12 of NuVox with NewSouth. I saw a lot of 13 materials over the course of a year-long 14 period where we considered this. I was 15 not privy to certain confidential and 16 proprietary information provided to our 17 board of directors by both our senior 18 management and by outside advisors, so I 19 have not seen a final report related to 20 the benefits or risks of this merger. 21 Q. But you assumed something along those 22 lines was done; right? 23 A. That's correct. 24 Q. And would it be fair to say that such an 25 analysis would include some estimate of</p>
<p style="text-align: right;">Page 248</p> <p>1 which was the parent company of NewSouth 2 Communications Corp. NewSouth 3 Communications Corp is new a subsidiary of 4 NuVox, Inc. NuVox Communications, Inc., 5 and NewSouth Communications Corp are still 6 separate operating entities, both 7 subsidiaries of NuVox, Inc. 8 MR. CULPEPPER: I'm going to ask 9 the court reporter to mark this page off 10 the NuVox website as the next deposition 11 exhibit. 12 (DEPOSITION EXHIBIT NO 15 WAS MARKED.) 13 Q. Now, take a look at the highlighted 14 portions, Mr. Russell. I believe that 15 exhibit states that the merger is complete 16 between NewSouth and NuVox? 17 A. Completed its merger of equal, that's 18 correct. 19 Q. Is it accurate? 20 A. It's accurate in that NuVox, Inc., the 21 holding company for NuVox Communications 22 acquired NewSouth Communications, yes. I 23 mean, that company was merged into an 24 acquisition co. specifically formed for 25 the purpose of, in a sense, receiving the</p>	<p style="text-align: right;">Page 250</p> <p>1 the costs associated with merging the two 2 companies? 3 A. There was an estimate of the cost 4 associated with merging those two 5 companies. There was not, however, a very 6 precise estimate of the cost associated 7 with any merger of the companies that 8 would be inflicted on the companies by 9 BellSouth because we could not get any 10 prices in that regard. 11 Q. Did NuVox approach BellSouth prior to the 12 merger to obtain any estimate of any type 13 of cost associated with the merger of the 14 two companies? 15 A. In a sense, in that we looked at 16 information on BellSouth's websites. We 17 have -- I can't recall when exactly we 18 discussed things with Keith Milner and 19 others, but keep in mind that prior to the 20 announcement that you gave to me, the 21 merger of the company was confidential. 22 The companies -- tried to get as much 23 information as you could in a careful 24 fashion, but we could not find any 25 specific information that was publicly</p>

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<p style="text-align: right;">Page 251</p> <p>1 available to CLEC -- to CLECs like NuVox 2 from our -- from BellSouth websites or 3 from our account team. 4 Q. And that -- just to get the time frames, 5 that would have been prior to May of 2004 6 or prior to -- 7 A. Yes. Yes. 8 Q. You mention that the merger or integration 9 of operations should be completed by 10 January 2005; right? 11 A. That's what we're hoping to accomplish. 12 However, the company has also considered 13 having these companies operate 14 independently as -- both as subsidiaries 15 of NuVox, Inc. 16 Q. So -- So are the companies -- are you 17 planning to have these companies 18 integrated by January of 2005 or not? 19 A. We've integrated the operating -- the 20 operations of the holding company. I 21 don't know, we don't have two IT 22 departments. We don't have two sales and 23 marketing departments. We don't have two 24 finance departments. Single departments 25 handle the business of both NuVox and</p>	<p style="text-align: right;">Page 253</p> <p>1 contacts we have -- as I have been told, 2 communicated with -- I have communicated 3 with Keith Milner at our summits about who 4 to talk with. We have talked with Andrew 5 Calderello. We have talked with another 6 lady there -- her name escapes me -- who 7 works with this -- some team that 8 supposedly has some prices I don't have 9 any specifics related to that. 10 Q. Now, yesterday I believe you went through 11 some of the history of NuVox, went from 12 State Communications -- 13 A. Uh-huh. 14 Q. -- to Trivergent to acquisition of 15 Gabriel; is that right? 16 A. Merger of Gabriel and NuVox. 17 Q. Was BellSouth involved with any of these 18 mergers or other prior activity? 19 A. I believe that BellSouth was involved in 20 transferring any Gabriel OCNs to NuVox. 21 But keep in mind that that merger -- NuVox 22 operated in the BellSouth states. Gabriel 23 operated in SBC and Ameritech states. 24 Only in Kentucky was there any overlap, 25 and the customer base of Gabriel in</p>
<p style="text-align: right;">Page 252</p> <p>1 NewSouth. From an operations standpoint, 2 the operations have been integrated. 3 From the standpoint of putting all 4 NuVox customers -- or NewSouth customers 5 on to NuVox's OCNs, that has not been 6 accomplished. We've tried to have 7 discussions with BellSouth about that. 8 Q. Well, does BellSouth need to do anything 9 to meet this January 2005 deadline? 10 A. We've asked for prices related to what 11 work BellSouth believes that it would need 12 to do to assist us in completing the -- in 13 a sense, the assignment of NewSouth 14 circuits to NuVox and have yet to receive 15 any information indicating any ballpark 16 figure from BellSouth. 17 Q. Have you been involved in discussions with 18 BellSouth about merger-related rates or 19 samples? 20 A. I have. 21 Q. You have? 22 A. I have. 23 Q. Who have you talked with at BellSouth? 24 A. My paralegal, Mary Campbell, and another 25 fellow at NuVox have been the primary</p>	<p style="text-align: right;">Page 254</p> <p>1 Kentucky was diminimus. The change as-is 2 orders that were turned in -- and I'm 3 guessing that that was what was turned in 4 -- it was not -- it was not this same 5 type of integration process. 6 Q. Page 97 of the direct testimony, lines 10 7 to 12, you state that mass migrations at 8 most amount to bulk porting situations and 9 they are not extraordinarily complex and 10 they don't require BellSouth to do new and 11 unique things. How do you know what is 12 required of BellSouth with respect to 13 them? 14 A. Well, I mean, I would -- our experience 15 would lead me to believe that it would be 16 something along the lines of a change 17 as-is order or record change. It wouldn't 18 necessarily, that the -- in the event 19 that we transferred a NewSouth customer to 20 NuVox, the NewSouth customer already has 21 the loop. We've already provisioned it, 22 installed it. Any BellSouth work related 23 to that loop, the physical work, would 24 have already been accomplished. A billing 25 change would need to occur. That may</p>

<p style="text-align: right;">Page 255</p> <p>1 be -- That may require someone to 2 manually assign that account or the 3 charges related to that account to NuVox, 4 but it would be, in my mind, a record 5 change or a change as-is order. 6 Q. What would be the basis for your position 7 of mass migration rates and charges should 8 comport with TELRIC pricing standards? 9 A. What's the basis for my statement? 10 Q. Yes. When I mean "basis", I'm talking 11 about do you have any authority, such as a 12 commission order or federal FCC order or 13 some other authority for the assertion 14 that mass migration rates could be priced 15 or comport with the federal TELRIC pricing 16 standards? 17 A. Only in terms of the requirement that a 18 record change or a change as-is order 19 shouldn't be charged out at retail rates. 20 I don't know of a specific section that I 21 can point to. I'll be happy to look into 22 that. You know, our position is that a 23 CLEC-to-CLEC migration, the record changes 24 associated with that should not be 25 different from the record changes</p>	<p style="text-align: right;">Page 257</p> <p>1 Q. Let's go real quick to issue 86-B, 2 disputes regarding unauthorized access to 3 the CSR information. 4 A. Okay. 5 Q. And do you know what CSR is? 6 A. Yes. 7 Q. Customer service -- 8 A. Customer service request. 9 Q. Okay. Page 93, line 5 of the direct 10 testimony, your statement there is, 11 self-help is nearly always an 12 inappropriate means of handling a contract 13 dispute. 14 A. Right. 15 Q. Define self-help for me. 16 A. Self-help would be BellSouth acts as both 17 judge and jury with regard to a dispute 18 on -- in this case CSR. 19 Let's assume a situation where 20 BellSouth notifies NuVox that it believes 21 that a NuVox sales rep is using CSR 22 information inappropriately. NuVox should 23 be able to investigate that, determine if, 24 in fact, BellSouth's charges are accurate, 25 or if they are not, explain to BellSouth</p>
<p style="text-align: right;">Page 256</p> <p>1 associated with changing -- with a 2 customer that chooses to go with -- to 3 service with a CLEC as opposed to 4 BellSouth. I don't believe in that 5 instance that BellSouth can charge a 6 retail rate related to that records 7 change. 8 Q. I appreciate your willingness to look into 9 it, but prior to filing this testimony, 10 did you do any legal research, any 11 investigation, come up with any authority 12 to support the position that mass 13 migration rates must be priced at TELRIC? 14 A. I compared that with the situation whereby 15 the base of my testimony was change as is 16 and record change orders from BellSouth to 17 a CLEC are priced at TELRIC. And by 18 analogy, the same rates should be applied 19 to a CLEC-to-CLEC record change that is 20 conducted by BellSouth. 21 Q. Do you know whether the BellSouth 22 processes would be the same between a 23 merger of CLECs versus one CLEC acquiring 24 another CLEC? 25 A. I don't know.</p>	<p style="text-align: right;">Page 258</p> <p>1 why they are not. 2 Where things get -- Where this 3 issue becomes important is if BellSouth 4 chooses not to accept NuVox's explanation 5 that it is -- that the sales rep is 6 acting appropriately or NuVox's 7 explanation that the sales rep is not 8 acting inappropriately but that NuVox will 9 take the appropriate action to rectify the 10 situation and BellSouth unilaterally 11 determines that it will terminate NuVox's 12 access to either provisioning systems or 13 terminate service, that is the type of 14 self-help I'm talking about. 15 Q. Does NuVox have any what you call 16 self-help or define as self-help? Does 17 NuVox have any right to terminate or 18 suspend the service of its customers in 19 its contracts or tariffs? 20 A. NuVox has a right to terminate service if 21 the customer is using the service 22 inappropriately. We have not, as I 23 recall, terminated voice services for any 24 customer without investigating that and 25 giving the customer an opportunity to</p>

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<p>1 respond or amend their behavior, if you</p> <p>2 will.</p> <p>3 Q. And has BellSouth terminated NuVox's</p> <p>4 services without giving NuVox an</p> <p>5 opportunity to respond to any concern?</p> <p>6 A No. However, at one point it was</p> <p>7 threatened because of an LOA dispute.</p> <p>8 This is some time ago, I believe '98 or</p> <p>9 '99. We provided evidence of an LOA and</p> <p>10 the issue went away.</p> <p>11 The problem is if it's a</p> <p>12 disagreement, we hope for the best, plan</p> <p>13 for the worst. I don't know when</p> <p>14 BellSouth's policies with regard to</p> <p>15 self-help will change.</p> <p>16 Q. Self-help is nearly always an appropriate</p> <p>17 means of handling a contract dispute.</p> <p>18 Give me an example when it is appropriate.</p> <p>19 A. An example -- NuVox example, an ISP that</p> <p>20 is -- we have good reason to believe is</p> <p>21 pedaling child pornography and we are --</p> <p>22 we are asked by a governmental authority</p> <p>23 to use the self-help that our acceptable</p> <p>24 use policy allows and pull an internet</p> <p>25 site down, that is an acceptable use of</p>	<p>1 (THE DEPOSITION CONCLUDED AT 12:46 P.M.)</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>																																																				
Page 260	Page 262																																																				
<p>1 self-help</p> <p>2 Q. Would that NuVox acceptable use policy be</p> <p>3 subject to a dispute resolution provision</p> <p>4 where the ISP could disagree with the</p> <p>5 assertion that there was child pornography</p> <p>6 passing through the internet?</p> <p>7 A. The ISP could certainly negotiate for a</p> <p>8 dispute resolution procedure at the</p> <p>9 initiation of the contractual</p> <p>10 relationship.</p> <p>11 Q. Would NuVox agree at that point to propose</p> <p>12 suspending or terminating service to this</p> <p>13 particular ISP if this --</p> <p>14 A. If we have a seven-year past history with</p> <p>15 that ISP and its been a good relationship,</p> <p>16 I think we would do that.</p> <p>17 Q. Is it fair to say, regardless -- or</p> <p>18 setting aside contractual rights that</p> <p>19 NuVox may have in that situation, how the</p> <p>20 matter is handled would depend on the</p> <p>21 facts and circumstances of the parties?</p> <p>22 A. Absolutely.</p> <p>23 MR. CULPEPPER: I don't have any</p> <p>24 further questions for you, Mr. Russell.</p> <p>25 THE WITNESS: Wow. Fantastic.</p>	<p>1 ERRATA SHEET</p> <p>2</p> <p>3 Case name: In the Matter of</p> <p>4</p> <p>5 Joint Petition NewSouth</p> <p>6 Communications for</p> <p>7 Arbitration with BellSouth</p> <p>8</p> <p>9 Deponent: Hamilton Russell, Volume II</p> <p>10</p> <p>11 Date:</p> <p>12</p> <table><tr><th>PAGE</th><th>LINE</th><th>READS</th><th>SHOULD READ</th></tr><tr><td>14</td><td>/</td><td>/</td><td>/</td></tr><tr><td>15</td><td>/</td><td>/</td><td>/</td></tr><tr><td>16</td><td>/</td><td>/</td><td>/</td></tr><tr><td>17</td><td>/</td><td>/</td><td>/</td></tr><tr><td>18</td><td>/</td><td>/</td><td>/</td></tr><tr><td>19</td><td>/</td><td>/</td><td>/</td></tr><tr><td>20</td><td>/</td><td>/</td><td>/</td></tr><tr><td>21</td><td>/</td><td>/</td><td>/</td></tr><tr><td>22</td><td>/</td><td>/</td><td>/</td></tr><tr><td>23</td><td>/</td><td>/</td><td>/</td></tr><tr><td>24</td><td>/</td><td>/</td><td>/</td></tr><tr><td>25</td><td>/</td><td>/</td><td>/</td></tr></table>	PAGE	LINE	READS	SHOULD READ	14	/	/	/	15	/	/	/	16	/	/	/	17	/	/	/	18	/	/	/	19	/	/	/	20	/	/	/	21	/	/	/	22	/	/	/	23	/	/	/	24	/	/	/	25	/	/	/
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<p>1 SIGNATURE</p> <p>2 I, Hamilton Russell, do hereby state under</p> <p>3 oath that I have read the above and</p> <p>4 foregoing deposition in its entirety and</p> <p>5 that the same is a full, true and correct</p> <p>6 transcript of my testimony</p> <p>7 Signature is subject to corrections on</p> <p>8 attached errata sheet, if any</p> <p>9</p> <p>10 Hamilton Russell</p> <p>11</p> <p>12 State of</p> <p>13</p> <p>14 County of</p> <p>15</p> <p>16 Sworn to and subscribed before me this</p> <p>17 day of , 20</p> <p>18</p> <p>19 Notary Public</p> <p>20 My commission expires</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	Page 263	
<p>1 CERTIFICATE</p> <p>2 State of North Carolina</p> <p>3 County of Hamett</p> <p>4</p> <p>5 I, Nicole Ball Fleming, a notary public in</p> <p>6 and for the State of North Carolina, do</p> <p>7 hereby certify that there came before me</p> <p>8 on the 15th day of December, 2004, the</p> <p>9 person hereinbefore named, who was by me</p> <p>10 duly sworn to testify to the truth and</p> <p>11 nothing but the truth of his knowledge</p> <p>12 concerning the matters in controversy in</p> <p>13 this cause, that the witness was thereupon</p> <p>14 examined under oath, the examination</p> <p>15 reduced to typewriting by myself, and the</p> <p>16 deposition is a true and accurate</p> <p>17 transcription of the testimony given by</p> <p>18 the witness</p> <p>19 I further certify that I am not counsel</p> <p>20 for, nor in the employment of any of the</p> <p>21 parties to this action, that I am not</p> <p>22 related by blood or marriage to any of the</p> <p>23 parties, nor am I interested, either</p> <p>24 directly or indirectly, in the results of</p> <p>25 this action</p> <p> In witness whereof, I have hereto set my</p> <p> hand and affixed my official notarial</p> <p> seal, this the 28th day of December,</p> <p> 2004</p> <p> Nicole Ball Fleming</p> <p> Notary Public</p> <p> My commission expires 4/30/05</p>	Page 264	

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